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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CONSEJO de DESARROLLO
ECONOMICO de MEXICALI, AC;
CITIZENS UNITED FOR RESOURCES
AND THE ENVIRONMENT; and
DESERT CITIZENS AGAINST
POLLUTION,

Plaintiffs,

v.

UNITED STATES OF AMERICA; GALE
NORTON, SECRETARY OF THE
DEPARTMENT OF THE INTERIOR; and
JOHN W. KEYS III, COMMISSIONER
OF THE BUREAU OF RECLAMATION,

Defendants.

2:05-CV-0870-PMP (LRL)

ORDER RE:
SUMMARY JUDGMENT

CITY OF CALEXICO,

Plaintiff-Intervenor,

IMPERIAL IRRIGATION DISTRICT;
SAN DIEGO COUNTY WATER
AUTHORITY; CENTRAL ARIZONA
WATER CONSERVATION DISTRICT;
STATE OF NEVADA; SOUTHERN
NEVADA WATER AUTHORITY; and
COLORADO RIVER COMMISSION of
NEVADA,

Defendant-Intervenors.

1 A long history precedes this action commenced July 19, 2005, by Plaintiffs’
2 Complaint for Injunctive and Declaratory Relief challenging the final authorization of the
3 All-American Canal Lining Project (AACLP).

4 The Mexicali Aquifer underlies both the Imperial Valley in California and the
5 Mexicali Valley in Mexico. Prior to 1901, waters from the Colorado and Alamo rivers
6 recharged the Mexicali aquifer. In 1901, the Alamo Canal was constructed through the
7 channelization of the Alamo River and because it was unlined, the river continued to
8 recharge the aquifer. In 1928, Congress authorized the Bureau of Reclamation to build a
9 canal wholly within the United States.

10 The All-American Canal, which was completed in 1942, is located in California’s
11 Imperial Valley and provides a route through which Colorado River water is delivered to
12 the Imperial Valley and Mexico. The All-American Canal is unlined and provides as much
13 as eleven to twelve percent of the recharge water to the Mexicali Aquifer, which underlies
14 both the Imperial Valley in California and the Mexicali Valley in Mexico.

15 In 1944, the United States and Mexico entered into a water treaty that allocated the
16 waters of the Colorado River between the two countries. See Treaty between the United
17 States of America & Mex. Respecting Utilization of Waters of the Col. & Tijuana Rivers &
18 of the Rio Grande [“1944 Water Treaty”], 59 Stat. 1219, T.S. No. 994, Section III, Art. 10
19 (Nov. 8, 1945). The 1944 Water Treaty committed to the International Boundary and Water
20 Commission (“IBWC”) the power to resolve disputes arising under the Treaty. Id., Arts. 2,
21 24(d). It also requires the United States to deliver 1.5 million acre-feet of Colorado River
22 water to Mexico. Id., Art. 10.

23 In 1988, Congress passed the San Luis Rey Indian Water Rights Settlement Act
24 which authorized the Secretary of the Interior “to construct a new lined canal or to line the
25 previously unlined portions of the All American Canal . . . or construct seepage recovery
26 facilities” Pub. L. No. 100-675, 102 Stat. 4000, § 203. Congress authorized the

1 action because “significant quantities of water currently delivered into the All-American
2 Canal and its Coachella Branch are lost by seepage from the canals and that such losses
3 could be reduced or eliminated by lining these canals.” Id. § 201. After conducting
4 environmental studies considering the impacts the All-American Canal lining project and
5 other alternatives, including a no-action alternative, the Bureau of Reclamation
6 (“Reclamation”) issued its Final Environmental Impact Statement (“FEIS”) which was
7 noticed in the Federal Register in March 1994. 59 Fed. Reg. 18,573 (Apr. 19, 1994).
8 Reclamation approved the Record of Decision (“ROD”) authorizing the All-American
9 Canal lining project on July 29, 1994. (AR 1.) Subsequent to the issuance of the ROD,
10 Reclamation and the United States section of the IBWC have engaged in diplomatic
11 interchange with Mexico and the Mexican section of the IBWC. (Mem. in Supp. of United
12 States’ Mot. to Dismiss Counts 1-4 and 7-8 [Doc. #36], Exs. 6-10; AR 7586.)

13 At the time of the 1994 FEIS, California was using over five million acre feet of
14 Colorado River Water per year, well over its normal year apportionment of 4.4 million acre
15 feet of water per year. (AR 7595.) In 2002 to 2003, the Federal Defendants and California
16 water agencies “began an intensive effort to assist California in reducing its historical
17 overuse of Colorado River Water.” (Id.) On October 10, 2003, the Federal Defendants and
18 other parties entered into an Allocation Agreement Among the United States of America,
19 the Metropolitan Water District of Southern California, Coachella Valley Water District,
20 Imperial Irrigation District, San Diego County Water Authority, the La Jolla, Pala, Pauma,
21 Rincon & San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Authority,
22 the City of Escondido & Vista Irrigation District (“Allocation Agreement”). (Imperial
23 Irrigation Dist.’s Request for Judicial Notice & Lodgment of Exs. in Supp. of its Mot. to
24 Intervene & Mot. to Dismiss [“IID Exs.”] [Doc. #45], Ex. 8.) The Allocation Agreement
25 “pertains to the allocation of water conserved by the planned lining of the All-American
26 Canal, which carries water from the Colorado River to [Imperial Irrigation District’s

1 (“IID”)] service area.” (Decl. of Mark Hattman [Doc. #199-3], Ex. 1 at 15-16.) The
2 Allocation Agreement “provide[s] for the allocation of an amount of Colorado River water
3 equal to the amount conserved from the Title II works”¹ (IID Exs., Ex. 8 at 315.)

4 Under the Allocation Agreement, the Secretary of Reclamation (“the Secretary”)
5 must determine when the lining of the All-American Canal is complete and determine the
6 amount of water available for allocation as a result of the All-American Canal lining
7 project:

8 The Secretary will determine the completion of the lining of each canal reach
9 The Secretary will determine the amount of Colorado River water
10 available for allocation as a result of lining each canal reach . . . The Secretary
11 will send a notice of reach completion for each canal reach to the Parties as
each such reach is completed and . . . include in the notice the Secretary’s
determination as to the amount of water available for allocation as a result of
lining that reach.

12 (IID Exs., Ex. 8 at 328.) The Secretary also must “deliver Colorado River water available
13 for allocation as a result of the Projects each Calendar Year for the benefit of the San Luis
14 Rey Settlement Parties” (Id., Ex. 8 at 331.) The Allocation Agreement also provides:

15 If for any reason work on the All-American Canal Lining Project is
16 terminated prior to lining the All-American Canal or construction of a new
17 concrete-lined canal . . . the Secretary, after consultation with the Parties,
shall deem the Project to be complete and will determine the amount of
Colorado River water available for allocation from that Project.

18 (Id., Ex. 8 at 328.)

19 Additionally, the Allocation Agreement contains a clause limiting the manner and
20 venue in which parties can present disputes with the United States pursuant to the
21 Allocation Agreement:

22 Disputes under this Allocation Agreement involving the United States shall be
23 presented first to the Regional Director of the Lower Colorado Region of the

24 ¹ Title II refers to Title II of the San Luis Rey Indian Water Rights Settlement Act which
25 authorized the Secretary of the Interior “to construct a new lined canal or to line the previously unlined
26 portions of the All American Canal . . . or construct seepage recovery facilities” Pub. L. No. 100-
675, 102 Stat. 4000, § 203.

1 Bureau of Reclamation The decision of the Regional Director shall be
2 subject to appeal to the Commissioner The decision of the
3 Commissioner shall be subject to appeal to the Secretary The decision of
the Secretary may then be appealed to the federal courts to the extent
permitted by and in accordance with federal law.

4 (Id., Ex. 8 at 367.) On November 13, 2003, IID filed an amended complaint in California
5 state court to validate the Allocation Agreement pursuant to California law and 43 U.S.C.
6 § 390uu. The validation proceedings in California state court are ongoing but currently
7 stayed pending resolution of certain motions on appeal. (Decl. of Mark Hattman, Ex. 8.)

8 On September 9, 2004, Reclamation requested Fish and Wildlife Services (“FWS”)
9 to confirm as a biological opinion a conference opinion that FWS issued on February 8,
10 1996 regarding the effects of the All-American lining project on the Peirson’s milk-vetch.²
11 (AR 7648.) FWS confirmed the conference opinion as a biological opinion on January 10,
12 2006 because no significant information or changes existed that would alter FWS’s prior
13 opinion. (Id.) On November 18, 2005, Reclamation issued a Biological Analysis for the
14 All-American Canal Lining Project, Potential Species Impact in the Republic of Mexico,
15 which FWS reviewed and concluded Reclamation was not required to consult with FWS
16 regarding transboundary effects. (AR 7654, 7697.) On January 12, 2006, Reclamation
17 issued a Supplemental Information Report (“SIR”) regarding the lining project. In the SIR,
18 Reclamation determined that no substantial changes, significant new information, or

19
20 ² The Rule listing the Peirson’s milk-vetch as threatened describes the plant as follows:
21 Astragalus magdalenae var. peirsonii [Peirson’s milk-vetch] is a stout, short-lived
22 perennial reaching 20 to 70 cm (8 to 27 in) high. The stems and leaves are covered with
23 fine silky hairs and the leaves are 5 to 15 cm (2 to 6 in) long, with 3 to 13 small oblong
leaflets. The flowers are dull purple, arranged in 10- to 17- flowered racemes and the
resulting pods are 2 to 3.5 cm (0.8 to 1.4 in) long, inflated, with a triangular beak.

24 . . .
25 Astragalus magdalenae var. peirsonii grows in the Sonoran Desert, on the slopes and
hollows of windblown dunes it is known from the Borrego Valley, in San Diego
County, and the Algodones Dunes, in Imperial County, which extend just south of the
International Border into northeastern Baja California (Westec 1977).

26 63 Fed. Reg. 53596, 53599 (Oct. 6, 1998).

1 circumstances existed that would require Reclamation to issue a supplemental
2 environmental impact statement (“SEIS”). (AR 7575.)

3 Plaintiffs Consejo de Desarrollo Económico de Mexicali (“CDEM”), Citizens United
4 for Resources and the Environment (“CURE”), and Desert Citizens Against Pollution
5 (“DCAP”) filed suit in this Court on July 19, 2005, seeking injunctive and declaratory relief
6 and asserting eight claims. On February 9, 2006, the Court dismissed Counts 1-4 and 6-8 of
7 Plaintiffs’ original Complaint, which Plaintiffs subsequently amended. On June 26, 2006,
8 the Court dismissed Counts 1-4, and 7-8 of Plaintiffs’ Amended Complaint, Count 5 as it
9 relates to the 1994 FEIS, and Plaintiff CDEM from Count 6 for lack of standing. The Court
10 granted Plaintiff in Intervention status to the City of Calexico, California as to Count 5.
11 The remaining claim asserted by all Plaintiffs is violation of the National Environmental
12 Protection Act (“NEPA”) for failing to issue a SEIS (Count 5). Plaintiff CURE also asserts
13 a claim for violation of the Endangered Species Act (“ESA”) (Count 6).

14 Plaintiffs move for summary judgment as to Count 5 arguing Defendants violated
15 NEPA by failing to issue a SEIS because significant new information, circumstances, and
16 substantial changes exist requiring Reclamation to issue a SEIS. Plaintiff CURE also
17 moves for summary judgment as to Count 6 arguing new information exists requiring
18 Reclamation to reinitiate formal consultation with FWS under the ESA.

19 Federal Defendants and Defendant Intervenors oppose Plaintiffs’ motions for
20 summary judgment and cross-move for summary judgment arguing that no significant new
21 information, circumstances, or substantial changes exist requiring Reclamation to issue a
22 SEIS. Federal Defendants oppose Plaintiff CURE’s motion for summary judgment and
23 cross-move for summary judgment as to Count 6 arguing Reclamation fulfilled its
24 consultation obligations under the ESA, and that no new information exists that would
25 require Reclamation to re-initiate formal consultation with FWS. Defendant-Intervenor IID
26 also asserts this Court should abstain from deciding this case pursuant to the Colorado River

1 and the Younger doctrines.³

2 **I. MOTIONS TO LIMIT REVIEW, ALLOW DISCOVERY, TO STRIKE**
3 **& EVIDENTIARY OBJECTIONS**

4 Federal Defendants move to limit the scope of review to the Administrative Record
5 and to request the Court to issue an order protecting Federal Defendants from discovery.

6 _____
7 ³ Currently before the Court are Plaintiff CDEM's Motion for Summary Judgment, or
8 Alternatively, for Preliminary Injunction (Doc. #155); Plaintiffs CURE and DCAP's Motion for
9 Summary Judgment, or Alternatively, for Preliminary Injunction (Doc. #152); Federal Defendants'
10 Corrected Opposition to Plaintiffs' Motions for Summary Judgment or Preliminary Injunction, and in
11 Support of Federal Defendants' Cross-Motion for Summary Judgment (Doc. #229); and Memorandum
12 of Points and Authorities in Support of Imperial Irrigation District's Cross-Motion for Summary
13 Judgment and/or Stay of Action as to the First Amended Complaint (Doc. #211).

14 The parties filed the following oppositions and replies: Imperial Irrigation District's
15 Supplemental Opposition to Plaintiffs' Motion for Preliminary Injunction and/or Summary Judgment
16 (Doc. #237); Supplemental Response of CAWCD and State of Arizona in Opposition to Plaintiffs'
17 Motion for Summary Judgment or Preliminary Injunction, and in Support of Federal Defendants'
18 Cross-Motion for Summary Judgment (Doc. #239); DCAP & CURE's Combined Reply RE: Cross
19 Motions for Summary Judgment and Plaintiffs' Motion for Preliminary Injunction on NEPA Air
20 Quality Claims (Doc. #257); Intervenor City of Calexico's Reply and Motion to Join in Plaintiffs'
21 Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Alternative Motion
22 for Preliminary Injunction (Doc. #264); Plaintiffs' Combined Reply to Oppositions of Central Arizona
23 Water Conservation District and Arizona, the Metropolitan Water District of Southern California and
24 the Imperial Irrigation District and San Diego County Water Authority to Plaintiffs' Preliminary
25 Injunction and/or Summary Judgment (Doc. #270); Combined Reply and Response of Plaintiffs'
26 CDEM and CURE to Federal Defendants' Opposition to Motion for Summary Judgment or
Preliminary Injunction and Cross Motion for Summary Judgment (Doc. #272); and Imperial Irrigation
District's Reply to Plaintiffs' Opposition to Cross-Motion for Summary Judgment (Doc. #285).

The following joinders to the motions before the Court have been filed: Desert Citizens
Against Pollution's Joinder in Motion for Summary Judgment or Preliminary Junction (Doc. #153);
Nevada Intervenor's Joinder to the Federal Defendants' Opposition to Plaintiffs' Preliminary Injunction
and/or Summary Judgment (Doc. #208); Defendant-Intervenor San Diego County Water Authority's
Joinder to Imperial Irrigation District's Cross-Motion for Summary Judgment and/or Stay of Action
(Doc. #226); Defendant-Intervenor San Diego County Water Authority's Joinder to the United States
of America's Opposition to Plaintiffs' Motion for Summary Judgment or Preliminary Injunction and
Cross-Motion for Summary Judgment (Doc. #230); Nevada Intervenor's Joinder in Federal Defendants
Opposition to Plaintiffs' Motion for Summary Judgment (Doc. #236); Defendant-Intervenor San Diego
County Water Authority's Joinder to Imperial Irrigation District's Opposition to Plaintiff's Motion for
Preliminary Injunction and/or Summary Judgment (Doc. #242); DCAP's Joinder in CDEM's Reply
Briefs (Doc. #261); and Defendant-Intervenor San Diego County water Authority's Joinder to Imperial
Irrigation District's Reply to Pls.' Cross-Motion for Summary Judgment (Doc. #289).

1 (United States' Mot. to Limit the Scope of Review to the Admin. R. & for Protective Order
2 [Doc. #34].) The Court granted in part and denied in part the motion pending the resolution
3 of the motions to dismiss. (November 1, 2005 Order [Doc. #98].) Plaintiffs seek discovery
4 and to supplement the Administrative Record. (Pls.' Mot. to Supp. the Admin. R. [Doc.
5 #99].) Defendants also move to strike various declarations Plaintiffs submitted. (Fed.
6 Defs.' Mot. to Strike Pls.' Decls. & Docs. [Doc. #218].)

7 Plaintiffs move for judicial notice of various documents submitted with CDEM and
8 CURE's motion for summary judgment. (Request for Judicial Notice in Supp. of Mot. for
9 Summ. J. or Prelim. Inj. [Doc. #152].) Plaintiffs also request the Court to deem undisputed
10 Plaintiffs' Statement of Undisputed Material Facts attached to Plaintiffs DCAP and
11 CURE's motion for summary judgment because neither the Federal Defendants nor the
12 Defendant Intervenors opposed it. (Reply Re: Pls.' Separate Statement of Undisputed
13 Material Facts [Doc. #259].) Additionally, Plaintiffs move for leave to file Craig Morgan's
14 Declaration. (Pls.' Mot. for Leave to Late File the Decl. of Craig Morgan in Supp. of Pls.'
15 Mot. for Summ. J., or Alternatively, for Prelim. Inj. [Doc. #281].) Finally, Defendant-
16 Intervenor San Diego County Water Authority ("SDCWA"), IID, and Plaintiffs object to
17 various declarations and exhibits.

18 **A. Supplementing the Administrative Record/Allowing Discovery**

19 In reviewing agency decisions, courts should "typically focus[] on the administrative
20 record in existence at the time of the decision and does not encompass any part of the record
21 that is made initially in the reviewing court." The Lands Council v. Powell, 395 F.3d 1019,
22 1029 (9th Cir. 2005) (quoting S.W. Ctr. for Biological Diversity v. U.S. Forest Serv., 100
23 F.3d 1443, 1450 (9th Cir. 1996)). Nonetheless, in an action to compel agency action
24 unlawfully withheld or unreasonably delayed "review is not limited to the record as it
25 existed at any single point in time, because there is no final agency action to demarcate the
26 limits of the record." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir.

1 2000) (quotation omitted). The United States Court of Appeals for the Ninth Circuit has
2 articulated narrow exceptions to the general rule limiting review to the administrative
3 record:

4 (1) if admission is necessary to determine “whether the agency has considered
5 all relevant factors and has explained its decision,” (2) if “the agency has
6 relied on documents not in the record,” (3) “when supplementing the record is
7 necessary to explain technical terms or complex subject matter,” or (4) “when
8 plaintiffs make a showing of agency bad faith.”

9 The Lands Council, 395 F.3d at 1030 (quoting S.W. Ctr. for Biological Diversity, 100 F.3d
10 at 1450).

11 Defendants argue that because Plaintiffs challenge agency action, this Court’s review
12 is limited to the Administrative Record. They also argue the Administrative Record is
13 sufficient to show the agency’s decision-making process. Plaintiffs assert discovery is
14 necessary to determine whether the Administrative Record is complete. Additionally,
15 Plaintiffs argue they should be allowed to supplement the Administrative Record because
16 Reclamation failed to consider all of the relevant factors and information in making its
17 decisions not to re-initiate formal consultation and not to issue a SEIS. Plaintiffs further
18 contend Reclamation has acted in bad faith by failing to consider the Andrade Mesa
19 Wetlands when it knew of the wetlands’ existence or to consider the lining project’s
20 impacts on Mexico.

21 Because the remaining claims are actions to compel agency action unlawfully
22 withheld, the Court will not limit its review to the Administrative Record and instead will
23 consider materials submitted by Plaintiffs as they relate to the present matter. Specifically,
24 the Court will consider those materials concerning whether Reclamation acted arbitrarily or
25 capriciously in failing to issue a SEIS or re-initiate consultation with FWS. However, the
26 Court will not permit discovery because Plaintiffs have failed to show that discovery is
necessary to determine whether the agency has considered all the relevant factors, that the
agency has relied on documents not in the record, to explain technical terms or complex

1 subject matter, or that the agency has acted in bad faith. Accordingly, the Court will grant
2 Plaintiffs' motion to supplement the Administrative Record with admissible materials
3 relating to Plaintiffs' NEPA and ESA claims and will deny Defendants' motion to limit the
4 scope of review to the Administrative Record. Further, the Court will deny Plaintiffs'
5 request for discovery and grant Defendants' protective order.

6 **B. Motions to Strike**

7 Federal Defendants also move to strike the declarations of Paul Rosenfeld, Steven
8 Larson, and Edward Glenn attached to Plaintiffs' motions for summary judgment because
9 Federal Defendants argue the declarations are "wholly inappropriate in a record review
10 case." (Fed. Defs.' Mot. to Strike Pls.' Decls. & Docs. at 2.) Federal Defendants assert the
11 Court should strike the Declarations of Jane Williams, Stephanie Pincetl, and Fred Cagle,
12 Enrique Rovisora, Ricardo Hinojosa, and Michael Abatti to the extent they opine about the
13 sufficiency of Reclamation's environmental documents. For the reasons discussed above,
14 the Court may review extra-record materials to determine whether Reclamation considered
15 all the relevant factors and information in making its decision whether to issue a SEIS or re-
16 initiate formal consultation with FWS. Accordingly, the Court will deny Defendants'
17 motion to strike.

18 **C. Motion for Judicial Notice**

19 Plaintiffs DCAP and CURE move the Court to take judicial notice pursuant to
20 Federal Rule of Evidence 201 of the following documents: California Department of Health
21 Services Environmental Health Investigations Branch October 2005 Imperial County
22 Asthma Profile; Clean Air Initiative Second Community Survey Report Imperial County &
23 Mexicali dated June 2005; United States [EPA] Final and Proposed Rules re Finding of
24 Failure to Attain and Reclassification to Serious Nonattainment Imperial Valley Planning
25 Area dated August 11, 2004; California Air Resources Board PM10 Trends Summary:
26 Salton Sea Air Basin; California Air Resources Board PM10 Trends Summary: Brawley-

1 Main Street; California Air Resources Board PM10 Trends Summary: Westmoreland – W
2 1st Street; Imperial County Air Pollution Control District [“ICAPCD”] Rules 800 and 801;
3 South Coast Air Quality Management District Rule 403; [ICAPCD] Air Quality handbook
4 dated February 2005; County of Imperial Second Amended Petition for Writ of Mandate in
5 County of Imperial v. [IID], et al.; South Coast Air Quality Management District and
6 [ICAPCD]’s Petition for Writ of Mandamus in SCAQMD v. State Water Resources
7 Control Board, et al.; Sixty Day Notice Letter of [CURE] dated May 17, 2005; Sixty Day
8 Notice Letter of [DCAP]; United States EPA’s 1995 AP 42 Compilation of Air Quality
9 Pollutant Emission Factors section 13.2.2; United States EPA’s 1995 AP 42 Compilation of
10 Air Quality Pollutant Emission Factors section 13.2.3; and United States EPA’s 1995 AP 42
11 Compilation of Air Quality Pollutant Emission Factors section 13.2.4. Plaintiffs do not set
12 forth any argument supporting their request for judicial notice. Federal Defendants argue
13 the Court should not take judicial notice of these documents because the Court should limit
14 its review to the Administrative Record and the documents reflect ongoing and developing
15 scientific research, information which typically is not the type of facts for which judicial
16 notice is appropriate.

17 Federal Rule of Evidence 201 provides:

18 A judicially noticed fact must be one not subject to reasonable dispute in that
19 it is either (1) generally known within the territorial jurisdiction of the trial
20 court or capable of accurate and ready determination by resort to sources
whose accuracy cannot reasonably be questioned.

21 A Court may take judicial notice of the fact that a public record exists but may not
22 otherwise take judicial notice of the disputed facts contained therein. Lee v. City of Los
23 Angeles, 250 F.3d 668, 690 (9th Cir. 2001). Therefore, to the extent that Plaintiffs request
24 the Court to take judicial notice of the listed documents’ existence, the Court will do so.
25 However, absent Plaintiffs identifying to specific facts within the documents that are
26 appropriate for judicial notice, the Court will not take judicial notice of any facts or

1 information contained within those documents.

2 **D. Separate Statement of Undisputed Facts**

3 Plaintiffs CURE and DCAP argue that pursuant to Federal Rule of Civil Procedure
4 56 and Local Rule 56-1, the Court should deem undisputed the undisputed statement of
5 material facts they attached to their motion for summary judgment. Defendant Intervenor
6 IID counters that the Court should deny Plaintiffs' request because IID opposed those facts
7 in its supplemental opposition to summary judgment and that nothing in Federal Rule 56 or
8 Local Rule 56-1 requires parties to file a separate document disputing the facts or to dispute
9 each fact opposing parties list as undisputed. Moreover, IID argues Federal Defendants and
10 Defendant Intervenors contest Plaintiffs' alleged undisputed facts in their pleadings and
11 briefs.

12 Nothing in Federal Rule of Civil Procedure 56 or Local Rule 56-1 requires litigants
13 to file a separate document disputing opposing parties' statement of undisputed facts. See
14 Fed R. Civ. P. 56; Local Rule 56-1. Accordingly, the Court will deny Plaintiffs CURE and
15 DCAP's request to deem undisputed their Undisputed Statement of Material Facts.

16 **E. Motion for Leave to Late File**

17 Plaintiffs move for leave to file the Declaration of Craig W. Morgan arguing good
18 cause exists to allow late filing because the declarant's information first came to Plaintiffs'
19 attention on April 4, 2006. Defendant Intervenor SDCWA counters the Court should not
20 allow Plaintiffs to file the declaration because Plaintiffs have not stated sufficiently good
21 cause or excusable neglect. Federal Defendants argue the Court should deny Plaintiffs
22 leave to file because the declaration is outside the Administrative Record, the information in
23 the declaration was based on information known to the parties prior to April 4, 2006 and
24 Plaintiffs waited to file the declaration until after they filed their reply brief, and Plaintiffs
25 have not filed a memorandum of points and authority to support their motion.
26

1 Federal Rule of Civil Procedure 6(b) provides:

2 When by these rules or by a notice given thereunder or by order of court an act
3 is required or allowed to be done at or within a specified time, the court for
4 cause shown may at any time in its discretion (1) with or without motion or
5 notice order the period enlarged if request therefor is made before the
6 expiration of the period originally prescribed or as extended by a previous
7 order, or (2) upon motion made after the expiration of the specified period
8 permit the act to be done where the failure to act was the result of excusable
9 neglect

7 In considering whether excusable neglect exists, a district court must consider the following
8 criteria: “the danger of prejudice to the [nonmovant], the length of the delay and its potential
9 impact on judicial proceedings, the reason for the delay, including whether it was within the
10 reasonable control of the movant, and whether the movant acted in good faith.” Pioneer Inv.
11 Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 395 (1993).

12 The Court will grant Plaintiffs leave to file the declaration and consider it to the
13 extent it is relevant to whether Reclamation considered all relevant factors in deciding not to
14 issue a SEIS or reinstate formal consultation with FWS. The declaration will not create a
15 danger of prejudice to Defendants, because no new arguments are presented in the
16 declaration. The declaration contains information concerning Plaintiffs’ argument that
17 changes in the canal design pose a threat to human safety, an argument Plaintiffs previously
18 raised in their motion for summary judgment and reply brief. Nor will the delay in filing
19 impact these proceedings because Plaintiffs submitted the declaration only seven days after
20 their Reply and use it for the purpose of rebutting arguments Defendants made in their
21 opposition and cross-motion. Further, the reason for the delay was not within the reasonable
22 control of Plaintiffs because Plaintiffs were not aware of the declarant’s specific information
23 until April 4, 2006. Finally, no evidence exists that Plaintiffs acted in bad faith. Federal
24 Defendants have not presented any evidence Plaintiffs knew about the information prior to
25 that date and Plaintiffs moved for leave to file the declaration within two days of discovering
26 the information. Accordingly, the Court will grant leave to Plaintiffs to late file the

1 declaration and consider the declaration for the purposes discussed above.

2 **F. Evidentiary Objections**

3 “A trial court can only consider admissible evidence in ruling on a motion for
4 summary judgment.” Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)
5 (citing Fed. R. Civ. P. 56(e); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th
6 Cir. 1988)). Federal Rule of Evidence 402 provides “[a]ll relevant evidence is admissible,
7 except as otherwise provided by the Constitution of the United States, by Act of Congress,
8 by these rules, or by other rules proscribed by the Supreme Court Evidence that is not
9 relevant is not admissible.” Evidence is relevant if it “ha[s] any tendency to make the
10 existence of any fact that is of consequence to the determination of the action more probable
11 or less probable than it would be without the evidence.” Fed. R. Evid. 401.

12 “A witness may not testify to a matter unless evidence is introduced sufficient to
13 support a finding that the witness has personal knowledge of the matter [Such
14 evidence] may, but need not, consist of the witness’ own testimony.” Fed. R. Evid. 602.
15 Lay opinion testimony must be “(a) rationally based on the perception of the witness, (b)
16 helpful to a clear understanding of the witness’ testimony or the determination of a fact in
17 issue, and (c) not based on scientific, technical, or other specialized knowledge within the
18 scope of Rule 702.” Fed. R. Evid. 701. An expert witness “qualified as an expert by
19 knowledge, skill, experience, training, or education, may testify” about technical, scientific
20 or specialized knowledge, if “(1) the testimony is based upon sufficient facts or data, (2) the
21 testimony is the product of reliable principles and methods, and (3) the witness has applied
22 the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702. An expert
23 may base his or her opinion or inference on facts or data “made known to the expert at or
24 before the hearing. If of a type reasonably relied upon by experts in the particular field . . .
25 the facts or data need not be admissible in evidence in order for the opinion or inference to
26 be admitted.” Fed. R. Evid. 703. Opinion testimony “otherwise admissible is not

1 objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Fed.
2 R. Evid. 704.

3 Hearsay is inadmissible unless it meets one of the exceptions or exclusions provided
4 by the Federal Rules of Evidence. Fed. R. Evid. 802. Hearsay is “a statement, other than
5 one made by the declarant while testifying at the trial or hearing, offered into evidence to
6 prove the truth of the matter asserted.” Fed. R. Evid. 801. Federal Rule of Evidence 901
7 also requires a proponent to authenticate evidence before a court can admit the evidence.
8 This authentication requirement ““is satisfied by evidence sufficient to support a finding that
9 the matter in question is what its proponent claims.”” Alexander Dawson, Inc. v. N.L.R.B.,
10 586 F.2d 1300, 1302 (9th Cir. 1978) (quoting Fed. R. Evid. 901). Thus, “[t]he issue for the
11 trial judge under Rule 901 is whether there is prima facie evidence, circumstantial or direct,
12 that the document is what it is purported to be.” Id.

13 **1. SDCWA’s Evidentiary Objections**

14 SDCWA objects to certain paragraphs of the declarations of Edward Glenn,
15 Stephanie Pincetl, Michael Abatti, Gaylord Smith and attached exhibits, Heliodoro Gonzalez
16 Villanueva, Victor Smith, and Steven P. Larson, arguing the declarations are irrelevant, lack
17 foundation, argumentative, vague and ambiguous, hearsay, and speculative. (Evidentiary
18 Objections of [SDCWA] to Decls. of Edward Glen [sic], Nazario Ortiz, Stephanie Pincetl,
19 Enrique Roviroso, Michael Abatti, Gaylord Smith, Heliodoro Gonzalez Villanueva, and
20 Steven P. Larson [Doc. #196].) SDCWA also objects to the entire declarations of Nazario
21 Ortiz and Heliodoro Gonzalez Villanueva because they are in Spanish and English and no
22 declaration exists from any competent person that the English versions are true and correct
23 versions of the submitted Spanish versions; and SDCWA objects to certain paragraphs of the
24 declarations because they are irrelevant, lack foundation, and contain legal conclusions.
25 (Id.)

1 Additionally, SDCWA objects to paragraph four of the Declaration of Edie Harmon
2 arguing it is irrelevant, without foundation, not based on personal knowledge, and
3 inadmissible lay opinion. (Evidentiary Objections of [SDCWA] to Decls. of Edie Harmon,
4 Ricardo Hinojosa, Jane Williams, Fred Cagle, Ph.D., & Paul Rosenfeld, Ph.D. [Doc. #197].)
5 SDCWA also objects to certain paragraphs of the declarations of Ricardo Hinojosa, Jane
6 Williams, Fred Cagle, Ph.D., and Paul Rosenfeld, Ph. D. because they are irrelevant,
7 hearsay, lack foundation and personal knowledge, and offer opinions on ultimate facts. (Id.)
8 SDCWA objects to paragraphs in the Second Declaration of Steven P. Larson because they
9 are irrelevant, referenced documents are in Spanish and no translation is provided, and they
10 lack foundation. (Evidentiary Objections of [SDCWA] to the Second Decl. of Steven P.
11 Larson in Supp. of Pls.' Mot. for Prelim. Inj. [Doc. #274].)

12 Similarly, SDCWA objects to certain paragraphs of the Declaration of Claire
13 Browning Hervey arguing they are irrelevant. (Evidentiary Objections of [SDCWA] to the
14 Decl. of Claire Browning Hervey in Supp. of Pls.' Mot. for Prelim. Inj. [Doc. #275].)
15 SDCWA objects to paragraphs and exhibits A and B of the Declaration of Osvel Hinojosa-
16 Huerta asserting they are irrelevant, the declarant lacks the necessary credentials to qualify
17 as an expert, and Exhibit B is in Spanish and no translation is provided. (Evidentiary
18 Objections of [SDCWA] to the Decl. of Osvel Hinojosa-Huerta in Supp. of Pls.' Mot. for
19 Prelim. Inj. [Doc. #276]; Supplemental Evidentiary Objections of [SDCWA] to the Decl. of
20 Osvel Hinojosa-Huerta in Supp. of Pls.' Mot. for Prelim. Inj. [Doc. #280].) Finally,
21 SDCWA objects to the entire Declaration of Craig Morton arguing the declaration is
22 irrelevant and lacks foundation. ([SDCWA]'s Objection to the Decl. of Craig Morton Filed
23 in Supp. of Pls.' Mots. for Summ. J. or in the Alternative Prelim. Inj. [Doc. #295].)

24 **a. Relevance**

25 The majority of SDCWA's relevance challenges to the declarations rest on SDCWA's
26 argument that portions of the declarations are irrelevant because they relate to the lining

1 project's effects on Mexico and seepage to the Mexicali Aquifer. SDCWA argues that
2 information is irrelevant because the Court dismissed Plaintiffs' claims asserting rights to the
3 seepage water and that extra-territorial effects are irrelevant because Defendants are not
4 required to examine the effects of the lining project in Mexico. However, the information
5 about the impacts the lining project will have in Mexico and those impacts' transboundary
6 effects are relevant because they are facts that form the basis of Plaintiffs' claims under
7 NEPA and ESA. Further, whether Reclamation must examine the extra-territorial effects of
8 the lining project is a legal question for the Court to decide and is an issue still in
9 controversy. Accordingly, the Court declines to strike the challenged portions of the
10 declarations on that basis. The Court therefore will deny SDCWA's relevance objections to
11 the declarations of Edward Glenn, Nazario Ortiz, Stephanie Pincetl, Enrique Roviroso,
12 Michael Abatti, Heliodoro Gonzalez Villanueva, Victor Smith, Steven P. Larson, Edie
13 Harmon, Ricardo Hinojosa, Jane Williams, and Paul Rosenfeld Ph.D.; and to Exhibits C, D,
14 G, I to the Declaration of Gaylord Smith.

15 The Court also will consider evidence that relates to whether the California validation
16 proceedings are parallel to the present matter and air quality deterioration in the Imperial
17 Valley because such evidence is relevant to IID's summary judgment motion based on
18 abstention. Accordingly, the Court will deny SDCWA's relevance objections to the
19 declarations of Claire Brown Hervey, Michael Abatti, Fred Cagle, Ph.D., and Paul
20 Rosenfeld, Ph.D. The Court will sustain SDCWA's objections to the Declaration of Gaylord
21 Smith, Exhibit B, because the exhibit discusses the flat-tailed horned lizard rangewide
22 management strategy. Evidence concerning the flat-tailed horned lizard is irrelevant because
23 Plaintiffs make no claims concerning the flat-tailed horned lizard in the remaining claims in
24 Counts 5 or 6.

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b. Authentication

The Court will sustain SDCWA’s objection to the declarations of Nazario Ortiz and Heliodoro Gonzalez Villanueva because no evidence exists sufficient to support a finding that the matters in question are what their proponent claims. The declarations appear to have been written originally in Spanish and later translated into English. There is no indication that the English versions of the declarations are true and correct translations.

However, the Court will overrule SDCWA’s authentication objection to the Second Declaration of Steven P. Larson based on the declaration referencing documents that are written in Spanish. The letters are not offered as evidence, rather they form the basis of Steven P. Larson’s opinion. Likewise, the Court will overrule SDCWA’s authentication objection to the Declaration of Osvel Hinojosa-Huerta. Exhibit B to the declaration is one of Hinojosa-Huerta’s publications and the declarant offers it to demonstrate he is qualified as an expert and not as evidence.

c. Lack of Personal Knowledge/Expert Opinion Foundation

The Court will overrule SDCWA’s foundation and lack of personal knowledge objections to the Declaration of Edward P. Glenn because the declaration provides the foundation for his opinion. For the same reason, the Court will overrule SDCWA’s objections to the declarations of Steven P. Larson, Fred Cagle, Ph.D., Paul Rosenfeld, Ph.D., and Osvel Hinojosa-Huerta, to the extent the declarants do not state legal conclusions. The Court will overrule SDCWA’s objection to the Second Declaration of Steven P. Larson and the references to governmental documents in his declaration, because the declaration provides the foundation for his opinion and the information from governmental entities are the type of data reasonably relied upon by hydrologists in forming their expert opinions. The Court also will deny SDCWA’s objection to the Declaration of Edie Harmon because the declaration is based on the declarant’s personal knowledge.

1 The Court will sustain SDCWA's foundation and lack of personal knowledge
2 objections to paragraphs five, eight, ten, and eleven of the Declaration of Stephanie Pincetl
3 because the information is not within the declarant's personal knowledge and the declaration
4 does not set forth adequately the basis of the declarant's opinion as to technical, scientific or
5 specialized knowledge. For the same reasons, the Court will sustain SDCWA's objections to
6 paragraphs two, three, and five through eleven of the Declaration of Michael Abatti;
7 paragraph seven of the Declaration of Victor Smith; paragraph four of the Declaration of
8 Ricardo Hinojosa; and paragraphs five and nine of the Declaration of Jane Williams. The
9 Court will sustain SDCWA's foundation objections to paragraphs one through eight of the
10 Declaration of Enrique Rovisora and the Declaration of Craig W. Morton because the
11 declarations do not set forth adequately the basis of the declarants' opinions as to technical,
12 scientific, or specialized knowledge.

13 **d. Hearsay**

14 The Court will overrule SDCWA's hearsay objections concerning the Declaration of
15 Edward P. Glenn because the referenced documents are not offered for the truth of the
16 matter asserted but rather form the basis of the declarant's expert opinion. Likewise, the
17 Court will overrule SDCWA's hearsay objections to Exhibits C, D, and I, as the Court will
18 not consider the exhibits for the truth of the matter asserted. The Court will sustain
19 SDCWA's hearsay objection to paragraph six of the Declaration of Victor Smith, to the
20 extent those paragraphs opine about what other United States farming concerns knew or
21 were aware.

22 **2. IID's Evidentiary Objection**

23 IID and SDCWA object to Plaintiffs' submittal of a DVD movie depicting the
24 Mexicali Region and the accompanying Declaration of Victor Hermosillo because Plaintiffs
25 did not serve them with the DVD, and they further assert the DVD is hearsay, lacks oath or
26 affirmation, is improper expert or lay opinion, and is irrelevant. ([IID's] Objection to Pls.'

1 Submittal of a DVD Movie to the Ct. as Evid. [Doc. #282].) Plaintiffs provide the
2 Declaration of Claire Hervey Re Service of DVD Exhibit to Declaration of Victor
3 Hermosillo (Doc. #288) which states Plaintiffs inadvertently did not serve parties with the
4 DVD on March 31, 2006 because the file size was too large to download to the Court's
5 electronic case filing system. (Decl. of Claire Hervey Re Service of DVD Ex. to Decl. of
6 Victor Hermosillo ¶ 4.) In the declaration, Claire Hervey declares under penalty of perjury
7 that Plaintiffs subsequently served the parties with the DVD on April 10, 2006. (Id. ¶ 3.)
8 Nonetheless, the Court will sustain IID's objections to the DVD movie and the Declaration
9 of Victor Hermosillo because they are hearsay and do not set forth adequately the basis of
10 the opinions therein as to technical, scientific, or specialized knowledge.

11 **3. Plaintiffs' Evidentiary Objections**

12 Plaintiffs object to the Declaration of Michael King arguing that the Declaration is
13 irrelevant, speculative, lacks foundation, and violates NEPA's hard evidence rule by
14 referring to absent documents. (Pls.' Objections to Interveners' Decl. of Michael King
15 [Doc. #260].) Additionally, Plaintiffs object to paragraphs of the declarations of Stephen
16 Arakawa and Maureen Stapleton, asserting the declarations are irrelevant, speculative, and
17 lack foundation. (Pls.' Evidentiary Objections to Decls. of Stephen Arakawa, Maureen
18 Stapleton, & the Previously Filed Decl. of Dennis B. Underwood [Doc. #271].) Plaintiffs
19 also object to the Declaration of Dennis Underwood, because it is hearsay as the declarant
20 has died since the filing of the declaration, and argue the declaration also is irrelevant,
21 speculative, and lacks foundation. (Id.)

22 The Court will overrule Plaintiffs' objections to the Declaration of Michael King to
23 the extent the Declaration discusses how an injunction would harm IID and how the project
24 construction will comply with air quality guidelines as those are facts in consequence and the
25 declaration sets forth adequately the basis of the declarant's opinion as to technical,
26 scientific, or specialized knowledge. For the same reasons, the Court will overrule

1 Plaintiffs' objections to the declarations of Stephen Arakawa and Maureen Stapleton.
2 However, the Court will sustain Plaintiffs' objection to the Declaration of Dennis B.
3 Underwood.

4 **II. ABSTENTION**

5 Defendant Intervenor IID argues that Plaintiffs' Motion for Summary Judgment is an
6 attack on the Allocation Agreement because its effect is to enjoin the implementation of the
7 Allocation Agreement. Because the Allocation Agreement is already the subject of an
8 ongoing state court proceeding, IID argues this Court should abstain from deciding the issue
9 and either dismiss the case under the Younger doctrine or stay these proceedings pending the
10 outcome of the state court proceedings pursuant to the Colorado River doctrine. IID also
11 acknowledges that Plaintiffs could not have brought the NEPA claims under the APA in the
12 validation proceedings, but argues that because IID brought the validation action pursuant to
13 43 U.S.C. § 390uu⁴ the state court has concurrent jurisdiction over the NEPA claims through
14 43 U.S.C. § 390uu.

15 Plaintiffs respond that California Courts may validate only actions of California
16 public agencies, not federal agencies. They also argue that this action does not attack the
17 Allocation Agreement because it attacks Federal Defendants' agency action. Plaintiffs
18 similarly argue that granting injunctive relief in this action will not invalidate the Allocation
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20 ⁴ Title 43 U.S.C. § 390uu gives consent to join the United States as a defendant in certain
21 actions regarding a contract executed pursuant to federal reclamation law:

22 Consent is given to join the United States as a necessary party defendant in any suit to
23 adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and
24 the United States regarding any contract executed pursuant to Federal reclamation law.
25 The United States, when a party to any suit, shall be deemed to have waived any right
26 to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject
to judgments, orders, and decrees of the court having jurisdiction, and may obtain
review thereof, in the same manner and to the same extent as a private individual under
like circumstances. Any suit pursuant to this section may be brought in any United
States district court in the State in which the land involved is situated.

1 Agreement even if the effect of the relief delays or prevents the Allocation Agreement's
2 implementation. Finally, Plaintiffs argue they are not parties to the validation proceedings.
3 Accordingly, Plaintiffs assert neither the Colorado River nor the Younger doctrines apply to
4 this case.

5 **A. Younger Doctrine**

6 The doctrine propounded by Younger v. Harris, 401 U.S. 37 (1971), and its progeny
7 reflects a "strong federal policy against federal interference with ongoing state proceedings."
8 Meredith v. Oregon, 321 F.3d 807, 817, amended by 326 F.3d 1030 (9th Cir. 2003). A
9 federal district court should abstain under Younger when: 1) state judicial proceedings are
10 ongoing; 2) the proceedings implicate important state interests; and 3) the state proceedings
11 provide the plaintiff with an adequate opportunity to raise federal claims. Meredith, 321
12 F.3d at 817. Even if all of three criteria are met, Younger abstention is not appropriate in all
13 cases. Application of the Younger abstention doctrine is appropriate only when the federal
14 relief sought would interfere in some manner with the state court proceedings. Green v. City
15 of Tucson, 255 F.3d 1086, 1094 (9th Cir. 2001) (en banc).

16 The state proceedings seek to validate the Allocation Agreement. California Civil
17 Procedure Code provides the following:

18 A public agency may upon the existence of any matter which under any other
19 law is authorized to be determined pursuant to this chapter, and for 60 days
20 thereafter, bring an action in the superior court of the county in which the
principal office of the public agency is located to determine the validity of
such matter. The action shall be in the nature of a proceeding in rem.

21 Cal. Civ. Proc. Code § 860. "A validation action ([Cal.] Code Civ. Proc., § 860 et seq.)
22 allows a [California] public agency to obtain a judgment that its financing commitments are
23 valid, legal, and binding. If the public agency has complied with statutory requirements, the
24 judgment in the validation action binds the agency and all other persons." Friedland v. City
25 of Long Beach, 62 Cal. Rptr. 2d 427, 429 (Cal. Ct. App. 1998). Thus, if IID succeeded in
26 the validation hearings, it would "obtain a judgment that its financing commitments [under

1 the Allocation Agreement] are valid, legal, and binding” and the judgment would “bind
2 [IID] and all other persons.” See id.

3 The federal relief Plaintiffs seek, i.e., an injunction requiring Defendants to issue a
4 SEIS and to reinitiate formal consultation with FWS, would not interfere with the state court
5 proceedings. The matter before this Court addresses whether Federal Defendants violated
6 federal environmental laws by failing to issue a SEIS or re-initiate consultation with FWS.
7 If this Court were to issue an injunction requiring Federal Defendants to prepare a SEIS or
8 re-initiate consultation, such an injunction would not interfere with a holding by the state
9 court that the Allocation Agreement is binding and IID’s financial commitments are valid.
10 The parties to the Allocation Agreement still would be required to uphold their obligations
11 under the Allocation Agreement. The Secretary still could determine the completion of the
12 lining of the All-American Canal, determine the amount of water available for allocation as
13 a result of the All-American Canal lining, and deliver any Colorado River water available for
14 allocation as a result of the project. (IID Exs., Ex. 8 at 328, 331.) The Allocation
15 Agreement defines the Secretary’s duties if the project is terminated, requiring the Secretary
16 to determine the amount of water from the Colorado River available for allocation. (Id. at
17 328.) Because the validation proceedings concern the obligations of the parties under the
18 Allocation Agreement and not whether Federal Defendants complied with federal
19 environmental law, this action would not interfere with the state court validation
20 proceedings.

21 Furthermore, even if resolution of the matter before this Court would interfere with
22 the state proceedings, Plaintiffs would not have been able to sue Federal Defendants in state
23 court. First, the Allocation Agreement contains a clause requiring parties to present disputes
24 involving the United States to Reclamation first and then allowing appeals of any decision to
25 the Secretary of the Interior and then to United States district court. (IID Exs., Ex. 8 at 367.)
26 Hence, parties may not bring disputes with the United States arising under the Allocation

1 Agreement in a state court.

2 Second, 43 U.S.C. § 390uu does not waive the United States' immunity from suit in
3 state courts, rather it allows a party to a contract with Reclamation to sue for enforcement of
4 the contract in federal court. See 43 U.S.C. § 390uu ("Any suit pursuant to this section may
5 be brought in any United States district court in the State in which the land involved is
6 situated."); see also United States v. Mitchell, 445 U.S. 535, 538 (1980) ("absent an
7 unequivocal expression of congressional consent to suit, sovereign immunity bars even a
8 claim for non-monetary relief against the government"). Third, 43 U.S.C. § 390uu would
9 not allow Plaintiffs to assert their NEPA or ESA claims against Federal Defendants because
10 43 U.S.C. § 390uu "waives the United States' sovereign immunity from a declaratory relief
11 action brought by a party to a contract with the United States to establish the party's rights
12 under that contract." Wyoming v. United States, 933 F. Supp. 1030, 1038 (D. Wyo. 1996)
13 (citations omitted). Plaintiffs are not a party to the Allocation Agreement nor do they seek to
14 enforce any rights under the Allocation Agreement. (IID Exs., Ex. 8.) Accordingly, the
15 validation proceedings would not provide Plaintiffs with an adequate forum to litigate their
16 NEPA and ESA claims. Because these proceedings will not interfere with the validation
17 action and the validation action would not provide an adequate forum for Plaintiffs, the
18 Younger doctrine is inapplicable and the Court will not grant IID's motion for summary
19 judgment on that basis.

20 **B. Colorado River Doctrine**

21 The Colorado River doctrine requires federal courts to stay matters in which there are
22 ongoing parallel state proceedings. Colorado River Water Conserv. Dist. v. United States,
23 424 U.S. 800 (1976). Exact parallelism is not required but the federal and state proceedings
24 must be "substantially similar." Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989).
25 "Colorado River abstention should be invoked only in 'exceptional
26 circumstances.'" Id. at 1415 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr.
Corp., 460 U.S. 1, 19 (1983)). However, "[F]ederal abstention and deference to parallel

1 state proceedings is appropriate under Colorado River even when none of the more
2 established doctrines apply.” Fireman’s Fund Ins. v. Quackenbush, 87 F.3d 290, 298 (9th
3 Cir. 1996).

4 The Supreme Court has outlined six factors courts should consider in determining
5 whether the Colorado River doctrine applies:

- 6 (1) whether either court has assumed jurisdiction over a res; (2) the relative
7 convenience of the forums; (3) the desirability of avoiding piecemeal
8 litigation; . . . (4) the order in which the forums obtained jurisdiction; (5)
9 whether state or federal law controls[;] and (6) whether the state proceeding is
adequate to protect the parties’ rights.

10 Nakash, 882 F.2d at 298 (citing Colorado River, 424 U.S. at 818; Moses Cone, 460 U.S. at
11 25-26). Courts should apply the factors “in a pragmatic and flexible way, as part of a
balancing test rather than as a ‘mechanical checklist.’” Id. (quotation omitted).

12 The validation action is not a parallel proceeding to this matter. As discussed above,
13 the validation action seeks declaratory relief that IID’s financing commitments under the
14 Allocation Agreement are valid, legal, and binding. In this matter, Plaintiffs request
15 injunctive relief requiring Federal Defendants to issue a SEIS and to re-initiate FWS
16 consultation. In the matter before this Court, federal law controls entirely. As discussed
17 above, Plaintiffs could not have brought their NEPA or ESA claims through the validation
18 action. For the same reasons, the state proceeding would not protect adequately Plaintiffs’
19 or Federal Defendants’ rights. Although the state court obtained jurisdiction over the
20 validation action first and consolidating the actions in the state court would avoid piecemeal
21 litigation, that the validation action is not a parallel proceeding and does not protect
22 adequately the parties’ rights, weigh against abstention under the Colorado River doctrine.
23 Accordingly, the Court will deny IID’s motion for summary judgment on the basis of
24 abstention.

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1 **III. SUMMARY JUDGMENT**

2 **A. Legal Standard**

3 Summary judgment is appropriate if “the pleadings, depositions, answers to
4 interrogatories, and admissions on file, together with the affidavits, if any” demonstrate
5 “there is no genuine issue as to any material fact and . . . the moving party is entitled to a
6 judgment as a matter of law.” Fed. R. Civ. P. 56(c). The substantive law defines which
7 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All
8 justifiable inferences must be viewed in the light most favorable to the non-moving party.
9 County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

10 The party moving for summary judgment bears the initial burden of showing the
11 absence of a genuine issue of material fact. Fairbank v. Wunderman Cato Johnson, 212 F.3d
12 528, 531 (9th Cir. 2000). The burden then shifts to the non-moving party to go beyond the
13 pleadings and set forth specific facts demonstrating there is a genuine issue for trial. Id.; Far
14 Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001).

15 **B. NEPA Violation – Count 5**

16 Plaintiffs argue Defendants violated NEPA because new information and
17 circumstances concerning the lining project’s environmental impacts require Reclamation to
18 prepare a supplement to the 1994 FEIS.⁵ Specifically, Plaintiffs assert Reclamation has
19 failed to address adequately significant new information regarding the Andrade Mesa
20 Wetlands in Mexico and listed species habitating therein, the socio-economic impacts on
21 Mexicali and the rebounding effects on the United States, increased impacts to the Salton
22 Sea, human safety, the deterioration of air quality in the Imperial Valley, and new PM-10⁶

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24 ⁵ Because the Court dismissed Plaintiffs’ challenges to the 1994 FEIS as time-barred,
25 Plaintiffs’ only remaining NEPA claim is that Reclamation improperly failed to issue a SEIS.

26 ⁶ PM-10 is “defined as airborne material having an aerodynamic diameter of 10 microns or
less. Hence, the common abbreviation ‘PM-10.’” Sierra Club v. U.S. E.P.A., 346 F.3d 955, 958 n.2

1 mitigation measures. Plaintiffs also argue Defendants may not use the 2006 SIR to address
2 the new information, especially given the lapse of time between it and the 1994 FEIS.

3 Defendants respond that no SEIS is required because the 2006 SIR concluded no
4 significant new impacts will result from the lining project. Defendants argue the 2006 SIR
5 adequately considers wetlands and listed species impacts, socio-economic effects, impacts
6 on the Salton Sea, public safety, air quality, and air quality mitigation. Additionally,
7 Defendants argue foreign impacts and their rebounding effects within the United States do
8 not require Reclamation to prepare a SEIS.

9 **1. Impacts on Mexico & Transboundary Effects**

10 Plaintiffs argue the existence of the Andrade Mesa Wetlands is significant new
11 information that requires the Federal Defendants to issue a SEIS. Additionally, Plaintiffs
12 argue that impacts on the Andrade Mesa Wetlands would affect listed species, in particular
13 the Yuma Clapper Rail, and that because the Yuma Clapper Rail's habitat is bi-national, the
14 effects will be felt within the United States. Plaintiffs also argue the loss of seepage water
15 from the All-American Canal will have a devastating effect on the Mexicali economy, which
16 in turn will have rebound effects within the United States, particularly within Calexico,
17 California.

18 Federal Defendants respond that the Court should dismiss Plaintiffs' claims involving
19 impacts on Mexico because the issue presents a non-justiciable political question. Federal
20 Defendants also contend NEPA does not require federal agencies to analyze extraterritorial
21 effects and that Reclamation's only obligation to examine impacts in Mexico arose under
22 Executive Order 12114, which does not create a cause of action. Finally, Defendants assert
23 that Reclamation was not required to examine the project's impacts on Mexico and the
24 rebounding effects because federal agencies only are required to look at the effects of agency

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 (9th Cir. 2003).

1 action to the extent of the agency's control or responsibility. Plaintiffs reply that because
 2 significant impacts in the United States will result from the lining project's effects in
 3 Mexico, NEPA requires Federal Defendants to prepare a SEIS concerning impacts in
 4 Mexico.

5 **a. Political Question**

6 The political question doctrine "prevent[s] the federal courts from intruding unduly
 7 on certain policy choices and value judgments that are constitutionally committed to
 8 Congress or the executive branch." Koohi v. United States, 976 F.2d 1328, 1331
 9 (9th Cir. 1992). When determining whether a case poses a political question, "courts should
 10 undertake a discriminating case-by-case analysis to determine whether the question posed
 11 lies beyond judicial cognizance." Alperin v. Vatican Bank, 410 F.3d 532, 545 (9th Cir.
 12 2005) (citing Baker v. Carr, 369 U.S. 186, 211 (1962)), cert. denied sub nom Order of Friars
 13 Minor v. Alperin, --- U.S. ----, 2006 WL 88991 (2006). Accordingly, the United States
 14 Supreme Court has suggested six factors to determine whether a case involves a non-
 15 justiciable political question:

16 Prominent on the surface of any case held to involve a political question is
 17 found [1] a textually demonstrable constitutional commitment of the issue to a
 18 coordinate political department; or [2] a lack of judicially discoverable and
 19 manageable standards for resolving it; or [3] the impossibility of deciding
 20 without an initial policy determination of a kind clearly for nonjudicial
 21 discretion; or [4] the impossibility of a court's undertaking independent
 resolution without expressing lack of the respect due coordinate branches of
 government; or [5] an unusual need for unquestioning adherence to a political
 decision already made; or [6] the potentiality of embarrassment from
 multifarious pronouncements by various departments on one question.

22 Baker, 369 U.S. at 217. "Dismissal on the basis of the political question doctrine is
 23 appropriate only if one of [the Baker factors] is 'inextricable' from the case." Alperin, 410
 24 F.3d at 544 (citing Baker, 369 U.S. at 217).

25 Generally, "'matters relating to the conduct of foreign relations . . . are so exclusively
 26 entrusted to the political branches of government as to be largely immune from judicial

1 inquiry or interference.” Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1439
2 (9th Cir. 1996) (quoting Regan v. Wald, 468 U.S. 222, 242 (1984) (citation omitted)).
3 Nevertheless, the Supreme Court has “cautioned against ‘sweeping statements’ that imply all
4 questions involving foreign relations are political ones.” Alperin, 410 F.3d at 545 (quoting
5 Baker, 369 U.S. at 217 (citation omitted)). For example, the interpretation of statutes
6 involving foreign affairs is a justiciable question even though a decision in the case may
7 have “significant political overtones” because the interpretation of statutes presents a purely
8 legal question. Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 230 (1986).
9 Further, “interpreting congressional legislation is a recurring and accepted task for the
10 federal courts.” Id.

11 Federal Defendants argue that whether NEPA requires Reclamation to examine the
12 lining project’s impacts on Mexico implicates the political question doctrine because it
13 “interjects this Court into an area that Mexico and the United States have made a matter of
14 diplomatic consultation pursuant to procedures agreed to under the 1944 Treaty.” (Fed.
15 Defs.’ Corrected Mem. of P. & A. in Opp’n to Pls.’ Mots. for Summ. J. or Prelim. Inj., & in
16 Supp. of Federal Defs.’ Cross-Mot. for Summ J. at 53.) Plaintiffs counter that whether
17 NEPA requires Federal Defendants’ to consider impacts in Mexico is irrelevant to the 1944
18 Water Treaty as NEPA compliance does not constitute a dispute between the United States
19 and Mexico.

20 Although the United States and Mexico have engaged in diplomatic negotiations
21 regarding the lining project,⁷ whether NEPA requires federal agencies to examine extra-
22 territorial impacts is a justiciable controversy because it presents a purely legal question of
23 statutory interpretation. See Japan Whaling Ass’n, 478 U.S. at 230. Accordingly, because
24 the political question doctrine is inapplicable, the Court will exercise jurisdiction over the
25 question.

26 ⁷ Defs.’ Mot. to Dismiss (Doc. #36), Exs. 6-10.

1 **b. Extraterritorial Application of NEPA**

2 Plaintiffs argue Defendants admit the significance of the loss of portions of the
3 Andrade Mesa Wetlands⁸ is significant and that significant impacts will result to the Yuma
4 Clapper Rail both in Mexico and the United States. Plaintiffs also argue that the loss of
5 canal seepage will impact negatively the Mexicali’s economy, the flow of water to the New
6 River in Mexico which feeds the Salton Sea, and air quality in the Mexicali Valley. As a
7 result, Plaintiffs argue Defendants must prepare a SEIS. Federal Defendants argue NEPA
8 does not require them to analyze the lining project’s impacts in Mexico because NEPA does
9 not apply outside of the United States.

10 “Acts of Congress normally do not have extraterritorial application unless such an
11 intent is clearly manifested.” Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993).
12 Title 42 U.S.C. § 4332(C) requires agencies to prepare a detailed report on “major Federal
13 actions significantly affecting the quality of the human environment.” NEPA’s
14 Congressional declaration of national environmental policy states:

15 it is the continuing policy of the Federal Government in cooperation with State
16 and local governments, and other concerned public and private organizations, .
17 . . . to promote the general welfare, to create and maintain conditions under
18 which man and nature can exist in productive harmony, and fulfill the social,
19 economic and other requirements of present and future Americans.
20 . . . it is the continuing responsibility of the Federal Government to use all
21 practicable means, consistent with other essential considerations of national
22 policy to improve and coordinate Federal plans, functions, programs, and
23 resources to the end that the Nation may –

24 (2) assure for all Americans, safe, healthful, productive, and esthetically and
25 culturally pleasing surroundings[.]

26 42 U.S.C. § 4331(a)-(b)(2). Nothing in NEPA’s language suggests Congress intended
NEPA to apply outside United States territory. To the contrary, the use of “[s]tate and local

24 ⁸ The Andrade Mesa Wetlands are “north and northwest of the Mexicali Valley town of
25 Yucatan [Mexico].” (AR 7666.)

1 governments” when describing with whom federal agencies must cooperate and
2 “Americans” and “the Nation” when describing who will benefit from NEPA’s policies
3 suggests Congress intended NEPA to apply only within United States territory. Moreover,
4 nothing in the Council on Environmental Quality (“CEQ”)⁹ regulations promulgated under
5 NEPA indicates clearly that agencies must examine extraterritorial impacts. See 40 C.F.R.
6 § 1500.1 et seq.

7 Nonetheless, “[q]uestions involving the reach of Congress’ prescriptive jurisdiction
8 are not implicated when the conduct sought to be regulated occurs within the United States.”
9 Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535, 1538 (9th Cir. 1994) (citing Env’tl Def.
10 Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993)). To determine whether the
11 conduct occurs within the United States, courts “look to the conduct proscribed by the
12 particular legislation and to the impact of the conduct within the United States.” Id. The
13 Ninth Circuit has not addressed what conduct makes NEPA applicable to extraterritorial
14 impacts resulting from agency action within the United States. Courts that have considered
15 the extraterritorial application of NEPA, in addition to looking at the statute itself, have
16 looked at whether the environmental impacts are wholly extraterritorial, whether the agency
17 action was entirely within United States territory, and whether the United States has
18 legislative control over the impacted area. See, e.g., Env’tl Def. Fund, Inc., 986 F.2d at 529;
19 Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n, 647 F.2d 1345, 1347-48
20 (D.C. Cir. 1981); Basel Action Network v. Maritime Admin., 370 F. Supp. 2d 57, 71-72 (D.
21 D.C. 2005); Greenpeace USA v. Stone, 748 F. Supp. 749, 758 (D. Haw. 1990).

22 If the environmental impacts fall exclusively within a foreign jurisdiction or in an
23 area over which the United States has no legislative control, courts have held NEPA does not
24

25 ⁹ NEPA provided for the creation of the Council on Environmental Quality, to, in part, “to
26 formulate and recommend national policies to promote the improvement of the quality of the
environment.” 42 U.S.C. § 4342.

1 apply. In Natural Resources Defense Council, Inc., the Court of Appeals for the D.C.
2 Circuit found that NEPA does not “impose[] an . . . EIS requirement . . . with respect to
3 impacts falling exclusively within foreign jurisdictions.” Natural Res. Def. Council, Inc.,
4 647 F.2d at 147-48. Similarly, the United States District Court for the District of Hawaii
5 found NEPA did not apply to agency actions on foreign soil that would have foreign policy
6 implications and interfere with a decision by the Executive branch. Greenpeace USA, 748 F.
7 Supp. at 761. In Basel Action Network, the district court determined NEPA did not apply to
8 agency action occurring on the high seas because the United States does not have
9 “legislative control over the high seas.” Basel Action Network, 370 F. Supp. 2d at 71-72.

10 However, if the agency action occurs within the United States and its impact will be
11 felt in an area over which the United States maintains legislative control, courts have held
12 that NEPA applies. In Massey, the D.C. Circuit held that NEPA applied “where the conduct
13 regulated by the statute occurs primarily, if not exclusively, in the United States, and the
14 alleged extraterritorial effect” will be felt in a sovereignless area, such as Antarctica, over
15 which the United States has “a great measure of legislative control.” Massey, 986 F.2d at
16 529. Additionally, in Greenpeace USA, the district court stated NEPA “may require a
17 federal agency to prepare an EIS for action taken abroad, especially where United States
18 agency action abroad has direct environmental impacts within this country, or where there
19 has clearly been a total lack of environmental assessment by the federal agency or foreign
20 country involved.” Greenpeace USA, 748 F. Supp. at 761.

21 Based on the facts here and absent a clear statutory intent to the contrary, NEPA does
22 not apply to the All-American Canal lining project’s environmental impacts in Mexico.
23 Although the agency action of constructing and lining a new section of the All-American
24 Canal will occur within the United States, the projects’ effects on the Andrade Mesa
25 Wetlands, the Mexican Yuma Clapper Rail population, the socio-economic situation in
26 Mexico, groundwater in the Mexicali Valley, seepage flow to the New River in Mexico, and

1 air quality in Mexico will occur outside United States territory in Mexico, a sovereign nation
2 over which Congress lacks legislative control. Nor will the loss of seepage water from the
3 canal, result in impacts within the United States directly traceable to agency action, as
4 discussed below. Additionally, Reclamation assessed impacts in Mexico and so
5 Reclamation has not failed completely to undertake an environmental assessment. (See
6 AR 7585-87.) Accordingly, NEPA does not require Reclamation to issue a SEIS examining
7 the All-American Canal project's impacts in Mexico.¹⁰ Because no genuine issue of material
8 fact exists that Federal Defendants violated NEPA by not preparing a SEIS regarding the
9 project's impacts on the Andrade Mesa Wetlands and other wetlands in Mexico,
10 groundwater levels in Mexico, the socio-economic situation in Mexico, the effects on air
11 quality in Mexico, and any seepage flow to the New River in Mexico, the Court will grant
12 summary judgment in favor of Federal Defendants on those claims.

13 **c. Transboundary Impacts**

14 Plaintiffs argue the project's alleged impacts on Mexico will result in significant
15 impacts within the United States, including reduced water flow to the Salton Sea, impacts on
16 the population of Yuma Clapper Rails within the United States, alleged reduced crop
17 importation to the United States, reduction in trade from Mexico, and more illegal
18 immigration. Plaintiffs also argue that CEQ guidance, consistent with long-standing
19 principles of international law, requires Defendants to consider the trans-boundary effects of
20 its actions. Defendants argue that impacts in Mexico and their rebound effects within the
21 United States are beyond agency control because of decisions made by Mexico regarding the
22 allocation of its share of water under the 1944 Water Treaty. Defendants also assert the
23 2006 SIR properly addresses transboundary impacts under CEQ guidance because to the
24

25 ¹⁰ The agency argues that it complied with Executive Order 12,114, 44 Fed Reg. 1957 (Jan.
26 4, 1979). The Court will not examine whether the agency complied with the Order because the Order
does not provide a cause of action and Plaintiffs have not brought a claim under it.

1 extent CEQ guidance required Reclamation to examine transboundary impacts, it does not
2 require the preparation of a SEIS and only requires agencies to examine transboundary
3 effects to the best of the agency's ability using reasonably available information.

4 NEPA includes "a requirement of a reasonably close causal relationship between a
5 change in the physical environment and the effect at issue. This requirement is like the
6 familiar doctrine of proximate cause from tort law." Metro. Edison Co. v. People Against
7 Nuclear Energy, 460 U.S. 766, 773 (1983). Therefore, "[s]ome effects that are 'caused by' a
8 change in the physical environment in the sense of 'but for' causation, will nonetheless not
9 fall within § 102 [of NEPA] because the causal chain is too attenuated." Id. at 774. For
10 example, in Metropolitan Edison Co., the Court determined that the agency action's impact
11 on psychological health did not require the agency to issue a SEIS because it involved an
12 "element of risk" that lengthened "the causal chain beyond the reach of NEPA." Id. at 775.
13 In so ruling, the Court reasoned that "the scope of the agency's inquiry must remain
14 manageable if NEPA's goal of ensur[ing] a fully informed and well considered decision, is
15 to be accomplished." Id. at 776 (internal quotation omitted).

16 Furthermore, "inherent in NEPA and its implementing regulations is a 'rule of
17 reason,' which ensures that agencies determine whether and to what extent to prepare an EIS
18 based on the usefulness of any new potential information to the decisionmaking process."
19 Dep't of Transp. v. Public Citizen, 541 U.S. 752, 767 (2004) (citing Marsh v. Or. Natural
20 Res. Council, 490 U.S. 360, 373-74 (1989)). Accordingly, if "the preparation of an EIS
21 would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason
22 worthy of that title would require an agency to prepare an EIS." Id. (citation omitted).
23 Hence, "where an agency has no ability to prevent a certain effect due to its limited statutory
24 authority over the relevant actions, the agency cannot be considered a legally relevant
25 'cause' of the effect." Id. at 769. In Public Citizen, the Supreme Court determined the
26 agency had no control over the environmental impact of its challenged action and therefore

1 NEPA did not require the agency to prepare an EIS, because the legally relevant cause of the
2 impact was not the agency action but action by the President of the United States and
3 Congress over which the agency had no discretion. Id. at 768-69.¹¹

4 Any transboundary impacts of lining the All-American Canal are too speculative to
5 support causation. First, the degree to which seepage from the All-American Canal
6 contributes to the Andrade Mesa Wetlands is unknown, although one report estimated that
7 the project would result in the loss of 502.3 acres of the wetlands. (AR 7698.) The wetlands
8 “are believed to be fully or partially supported by [All-American Canal] seepage because
9 they are not believed to have existed before the [All-American Canal] was constructed.”
10 (AR 7666.) However, “[s]ome evidence suggests that portions of the [Andrade Mesa
11 Wetlands] would remain after lining.” (AR 7669.) Moreover, the extent of the lining
12 project’s effect on the Andrade Mesa Wetlands is uncertain because “they are about the
13 same distance from the unlined reach [of the project] and the lined reach.” (AR 7670.)
14 Additionally, any impact to the Yuma Clapper Rail population within the Andrade Mesa
15 Wetlands “would represent a small fraction of the entire United States and Mexico
16 population.” (AR 7687.) Also, because any changes in water level will occur gradually and
17 given the Yuma Clapper Rail’s ability “to disperse some distance,” the Yuma Clapper Rails
18 “occupying the Andrade Mesa Wetlands “are likely to move to other habitats as the
19 conditions slowly degrade.” (AR 7699.)

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23 ¹¹ Plaintiffs argue that the United States District Court for the Southern District of
24 California’s decision in Border Power Plant Working Group v. Department of Energy, 260 F. Supp.
25 2d 997 (S.D. Cal. 2003), requires that Reclamation examine the socio-economic transboundary effects
26 and the transboundary effects on the Salton Sea. However, that case did not address directly whether
the agency possessed control over the environmental impact or state that an agency must assess impacts
that are attenuated or speculative. Id. Instead, Border Power held that an agency must assess
foreseeable, indirect impacts of its action. Id. at 1013.

1 Second, although Plaintiffs argue the project will “eliminate the source of water for
2 an entire farming community immediately south of the border[,]”¹² and that loss will result in
3 economic loss to the United States, particularly Calexico, and put increasing migratory and
4 agricultural pressures on the United States, the All-American Canal contributes only eleven
5 to twelve percent of the Mexicali Aquifer’s recharge water. (AR 32.) Whether the loss of
6 seepage water will impact the Mexicali Valley to the extent asserted by Plaintiffs is highly
7 speculative in the first instance. Whether that loss will result in socio-economic impacts
8 within the United States is even more speculative.

9 Third, the causal link between lining the canal and declining water levels in the
10 Mexicali Aquifer or the Andrade Mesa Wetlands are too attenuated given the lack of agency
11 control over Mexico’s allocation of water under the 1944 Water Treaty and the extent to
12 which the All-American Canal feeds the aquifer. That Mexico may choose to divert its share
13 of Colorado River water to areas other than the Andrade Mesa Wetlands or the Mexicali
14 Aquifer, or that Mexico may choose to accelerate the rate at which it pumps water from the
15 aquifer, is outside of Defendants’ control. Moreover, Defendants do not have any authority
16 to force Mexico to implement mitigation measures that would alleviate the increased
17 salinity, decreased groundwater, or loss of wetlands in Mexico that might occur because of
18 the lining project. Therefore, any impacts the loss of the seepage water may have on
19 Mexico and resulting impacts in the United States are not within agency control but are
20 within the control of Mexico pursuant to decisions it makes regarding its own water
21 resources. Accordingly, more information concerning those impacts would not be useful in
22 the decision making process and no purpose would be served by Reclamation preparing a
23 SEIS concerning the impacts.

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26 ¹² Pl. CDEM Mot. for Summ. J., or Alternatively for Prelim. Inj. (“CDEM Mot. for Summ. J.”) at 6.

1 CEQ guidance concerning transboundary effects also does not require Defendants to
2 analyze the lining project's transboundary effects. The CEQ Guidance on NEPA Analyses
3 for Transboundary Impacts provides the following:

4 NEPA requires agencies to include analysis of reasonably foreseeable
5 transboundary effects of proposed actions in their analysis of proposed actions
6 in the United States. Such effects are best identified during the agency's
7 scoping stage, and should be analyzed to the best of the agency's ability using
8 reasonably available information. Such analysis should be included in the
9 [environmental assessment] or EIS prepared for the proposed action.

10 (CDEM & CURE Mot. for Summ. J., Decl. of Gaylord Smith, Ex. H.) It also notes that
11 judicial doctrines interpreting NEPA still apply to agency action:

12 Agencies do have a responsibility to undertake a reasonable search for
13 relevant, current information associated with an identified potential effect.
14 However, the courts have adopted a "rule of reason" to judge an agency's
15 actions in this respect, and do not require agencies to discuss "remote and
16 highly speculative consequences." . . . Additionally, in the context of
17 international agreements, the parties may set forth a specific process for
18 obtaining information from the affected country which could then be relied
19 upon in most circumstances to satisfy agencies' responsibility to undertake a
20 reasonable search for information.

21 Agencies have also pointed out that certain federal actions that may cause
22 transboundary effects do not, under U.S. law, require compliance with
23 Sections 102(2)(C) and 102(2)(E) of NEPA. Such actions include actions that
24 are statutorily exempted from NEPA, . . . and individual actions for which
25 procedural compliance with NEPA is excused or modified by virtue of . . .
26 various judicial doctrines interpreting NEPA. Nothing in this guidance
changes the agencies' ability to rely on those rules and doctrines.

27 (Id.) As discussed above, because the impacts in Mexico are beyond agency control and
28 their impacts within the United States are too speculative, NEPA's "rule of reason" does not
29 require Reclamation to prepare a SEIS regarding those impacts. Therefore, the Court will
30 deny Plaintiffs' motion for summary judgment based on the foreign impacts of the lining
31 project and their transboundary effects and grant the Defendants' cross-motion for summary
32 judgment on that basis.

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2. Domestic Impacts

1
2 Plaintiffs argue the project's impact on the Salton Sea due to loss of seepage from the
3 canal, the elimination of the escape ridges and its effect on human safety, and the
4 deterioration of air quality within the Imperial Valley constitute significant new information
5 requiring Defendants to issue a SEIS. Defendants respond that Reclamation properly
6 concluded through the 2006 SIR that no significant new impacts would result from the
7 project and therefore NEPA does not require Defendants to prepare a SEIS.

8 "NEPA 'is our basic national charter for protection of the environment.'" Churchill
9 County v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001) (quoting Blue Mountains v.
10 Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998)). NEPA and CEQ
11 regulations require federal agencies to prepare a detailed EIS for "major Federal actions
12 significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).
13 Compliance with NEPA ensures federal agencies will consider significant environmental
14 impacts of federal action, make available the relevant information, and open to public
15 scrutiny their decision making process. Churchill, 276 F.3d at 1072-73. "NEPA also
16 emphasizes the importance of coherent and comprehensive up-front environmental analysis
17 to ensure informed decision making to the end that the agency will not act on incomplete
18 information, only to regret its decision after it is too late to correct." Id. (quotation omitted).

19 "NEPA imposes on federal agencies a continuing duty to supplement existing . . .
20 EISs in response to 'significant new circumstances or information relevant to environmental
21 concerns and bearing on the proposed action or its impacts.'" Idaho Sporting Cong. Inc. v.
22 Alexander, 222 F.3d 562, 566 n.2 (9th Cir. 2000) (quoting 40 C.F.R. § 1502.9(c)(1)(ii)); see
23 also Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 529 (9th Cir. 1994). The
24 regulations implementing NEPA also require agencies to prepare a SEIS if "[t]he agency
25 makes substantial changes in the proposed action that are relevant to environmental
26 concerns[.]" 40 C.F.R. § 1502.9(c)(1)(I). Thus, an agency "cannot simply rest on the

1 original document.” Friends of the Clearwater v. Dombek, 222 F.3d 552, 557 (9th Cir.
2 2000). Rather, it must “continue to take a ‘hard look at the environmental effects of [its]
3 planned action, even after a proposal has received initial approval.” Id. (quoting Marsh,
4 490 U.S. at 374).

5 [T]he decision whether to prepare a supplemental EIS is similar to the decision
6 whether to prepare an EIS in the first instance: If there remains “major Federal
7 actio[n]” to occur, and if the new information is sufficient to show that the
8 remaining action will “affec[t] the quality of the human environment” in a
9 significant manner or to a significant extent not already considered, a
10 supplemental EIS must be prepared.

11 Marsh, 490 U.S. at 374 (quoting 42 U.S.C. § 4332(2)(C)).

12 “An action to compel an agency to prepare a SEIS is not a challenge to a final agency
13 decision, but rather an action arising under 5 U.S.C. § 706(1), to compel agency action
14 unlawfully withheld or unreasonably delayed.” Friends of the Clearwater, 222 F.3d at 560
15 (quotation omitted). A court should not set aside an agency’s decision not to prepare a SEIS
16 unless it was arbitrary or capricious. Marsh, 490 U.S. at 377. The reviewing court considers
17 “whether the decision was based on a consideration of the relevant factors and whether
18 there has been a clear error of judgment.” Friends of the Clearwater, 222 F.3d at 556
19 (quoting Marsh, 490 U.S. at 378). Just as with a review of an original EIS, the court does
20 not substitute its judgment for that of the agency. Id. In making its decision, “[a]n agency
21 need only articulate a rational connection between the facts it has found and its conclusions.”
22 Id. at 561 (citing United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376 (9th Cir.
23 1992)). Moreover, if analysis of “factual issues requires a high level of technical expertise,
24 ‘[courts] must defer to the informed discretion of the responsible federal agencies.’” Laguna
25 Greenbelt, Inc., 42 F.3d at 530 (quoting Marsh, 490 U.S. at 377)).

26 Neither NEPA nor the regulations implementing NEPA mention SIRs. Idaho
Sporting Cong. Inc., 222 F.3d at 566 (citations omitted). “[C]ourts have upheld agency use
of SIRs . . . for the purpose of determining whether new information or changed

1 circumstances require the preparation of a supplemental EA or EIS.” Id. (citations omitted).
2 In Marsh, the Supreme Court held that NEPA did not require the defendant agency to
3 prepare a SEIS because the agency had conducted studies that supported its conclusion that
4 “new information was of exaggerated importance.” Marsh, 490 U.S. at 384-85. An agency
5 must issue a SEIS, however, if it determines new significant information exists because
6 “SIRs cannot serve as a substitute [for a SEIS].” Id. For example, in Idaho Sporting
7 Congress, Inc., the Ninth Circuit held that the defendant agency violated NEPA because it
8 improperly relied on a SIR to correct deficiencies in an inadequate EIS. Id. at 568.

9 However, the Ninth Circuit has allowed agencies to use even an untimely SIR to
10 address whether significant new information exists. In Friends of the Clearwater, the Ninth
11 Circuit held that the defendant agency violated NEPA because it issued its SIR after
12 litigation commenced thus failing to evaluate in a timely manner the need for a SEIS.
13 Friends of the Clearwater, 222 F.3d at 559. Nonetheless, the Court did not overturn the
14 district court’s order granting summary judgment to the agency because the agency’s
15 decision in the SIR that no significant new information existed was not arbitrary and
16 capricious and “it would serve no useful purpose to remand [the] case to the district court for
17 it to order the [agency] to prepare studies that the [agency] already has completed and that
18 cannot be successfully challenged.” Id. at 561 (quotation omitted). Accordingly, this Court
19 must determine whether Reclamation’s conclusion in the 2006 SIR that there are no
20 significant new circumstances or information bearing on the All-American lining project
21 was arbitrary or capricious.

22 **a. Salton Sea**

23 Plaintiffs argue Reclamation received new information regarding All-American Canal
24 seepage water and the Salton Sea in 1999 via a hydrology study prepared by a consultant
25 company, Tetra Tech. Defendants counter Reclamation properly concluded in the 2006 SIR
26 that the Tetra Tech report was not reliable.

1 The Salton Sea is part of the affected environment of the lining project. (AR 90-91.)
2 It is “an ecosystem . . . under stress from increasing salinity, nutrient loading, oxygen
3 depletion, and temperature fluctuations Without restoration, the ecosystem will
4 continue to deteriorate.” (CDEM & CURE Mot. for Summ. J., Decl. of R. Gaylord Smith,
5 Ex. E.) On August 31, 1999, an internal Reclamation e-mail discussed a report by consultant
6 Tetra Tech (“Tetra Tech report”) that the Salton Sea Authority commissioned in 1999. (AR
7 1745.) The Tetra Tech report concluded the lining project could reduce ground water flows
8 to the Salton Sea by approximately 3,000 to 22,000 acre feet per year. (AR 1745.) Despite
9 the information in the Tetra Tech report, the 2006 SIR found that no significant new
10 circumstances or better information existed that would bear on the lining project’s impacts to
11 the Salton Sea. (AR 7605.) Reclamation specifically did not rely on the Tetra Tech report in
12 the 2006 SIR because evaluations of the Tetra Tech report raised questions about the report
13 and other studies presented conflicting information:

14 the Salton Sea Authority commissioned a 1999 study of the effects of lining
15 the All-American and Coachella Canals on the Salton Sea and adjacent
16 wetlands (Tetra Tech 1999). That study involved a groundwater model
17 analysis to determine the reduction in inflow to the Salton Sea from lining the
18 canals. The results of that study produced a range of values bordering on
19 insignificance. Reviews of the study and modeling analysis raised questions
20 regarding the input to the model and model calibration (Metropolitan 2000).
21 For example, as part of the calibration procedure, groundwater levels along the
22 model’s southern boundary in the Mexicali Valley were raised from actual
23 levels by as much as 20 feet. In addition, the study adopted a subsurface
24 inflow value of 8,000 [acre feet per year] under existing conditions, whereas
25 Reclamation and the U.S. Geological Survey (and the study’s peer review
26 panel) concluded that subsurface inflow to the Salton Sea along its east shore
is practically zero. Consequently, Reclamation did not rely on the Study’s
projected inflow conclusions in preparing this Supplemental Information
Report.

(AR 7605.)

24 Reclamation’s decision that no significant new circumstances or information existed
25 relating to the project’s impacts on the Salton Sea was not arbitrary or capricious because
26 Reclamation articulated a rational connection between the facts found and its conclusion.

1 The 2006 SIR found that no significant new circumstances or better information existed that
2 would bear on the lining project's impacts to the Salton Sea. (AR 7605.) Although the
3 Tetra Tech report stated the project could reduce groundwater flows to the Salton Sea by
4 3,000 to 22,000 acre feet per year, a separate evaluation of the Tetra Tech report raised
5 questions about the Tetra Tech report's methodology. (AR 7605.) Similarly, studies carried
6 out by Reclamation and the U.S. Geological Survey and its peer review panel reached
7 conclusions that conflicted with the Tetra Tech report. (*Id.*) Moreover, this an area in which
8 the agency and the U.S. Geological Survey possess technical expertise and the Court must
9 defer to Reclamation's informed discretion. See Laguna Greenbelt, Inc., 42 F.3d at 530.
10 Accordingly, Reclamation did not act arbitrarily or capriciously when it concluded no
11 significant new information or circumstances existed concerning the project's Salton Sea
12 impacts. Therefore, the Court will deny Plaintiffs' motion for summary judgement relating
13 to potential Salton Sea impacts and grant Defendants' cross-motion for summary judgment
14 relating to Salton Sea impacts.

15 **b. Public Safety**

16 Plaintiffs argue that eliminating the large mammal escape ridges from the canal
17 design plan and replacing the ridges with ladders is a substantial change to the 1994 FEIS
18 that requires Defendants to issue a SEIS. Plaintiffs assert that the design change will
19 threaten human safety. Defendants respond that the 2006 SIR clearly identified the changes
20 to the canal design and concluded they are not substantial changes or significant new
21 circumstances relevant to environmental concerns or impacts.

22 The 1994 FEIS proposed the inclusion of large mammal escape ridges¹³ in the canal
23

24 ¹³ The 1994 FEIS described the escape ridges as follows:

25 Concrete Escape Ridges would be cast on the sideslopes from the top to about halfway
26 down to the canal bottom to provide grip for humans and wildlife. The ridges would
protrude about 1-1/2 inches from the canal lining and be spaced about 18 inches apart.

(AR 64.)

1 design to combat the drowning risk to large mammals attempting to drink from or cross the
2 canal. (AR 118.) The 1994 FEIS noted a section of the Coachella Canal Prototype Lining
3 Project included such escape ridges and that wildlife biologists tested their effectiveness and
4 “the test showed the escape ridges to be very effective for safe wildlife entry and exit at [the
5 slope of 2-1/2:1].” (Id.) Nonetheless, the 1994 FEIS stated that the ridges might not be as
6 effective for the All-American lining project as for the Coachella project because the latter’s
7 slope was flatter. (Id. at 119.) Additionally, the 1994 FEIS noted “the low probability of
8 deer and other large mammals along the canal.” (Id.)

9 The 1994 FEIS also recognized the hazard a concrete-lined canal poses to human
10 safety. (Id. at 142.) “Reclamation standards for canal safety provide for the installation of
11 safety ladders every 750 feet on each side of a canal.” (Id. at 143.) The 1994 FEIS proposed
12 instead that the escape ridges be used “for mitigation of the escape hazard to humans in the
13 [canal].” (Id.) Tests on the Coachella project “proved [the ridges] reliable handholds and
14 footholds on a 2-1/2:1 slope.” (Id.) The 1994 FEIS assumed the ridges would be as reliable
15 for the All-American project as for the Coachella project but noted “[i]f field testing
16 indicates that the ridges are not completely effective, safety ladders would be added to the
17 canal design in addition to the ridges. The ridges are desirable for wildlife as discussed
18 under ‘Large Mammal Escape.’” (Id.)

19 The current All-American Canal design eliminates the escape ridges and instead
20 proposes safety ladders 375 feet apart on alternating sides of the canal and hazard signage in
21 English and Spanish. (AR 7620-21; 7628-29.) Reclamation eliminated the ridges from the
22 design plan because “Reclamation evaluated the structural integrity of the experimental test
23 section [on the Coachella Canal] with escape ridges and found a number of structural
24 problems . . . [which] could defeat the purpose of the Project.” (Id. at 7620.) Additionally,
25 Reclamation has commissioned a study of animal visitation to the canal area and “[o]ne year
26 of deer tracking and aerial surveys has been completed and no sign of deer in the area of the

1 Project has been found. This tracking study will continue for two years post-Project
2 construction.” (Id.) As a result, the 2006 SIR concluded the elimination of the ridges was
3 not a substantial change. (Id.) The 2006 SIR also concluded the elimination of escape
4 ridges do not constitute significant new circumstances or information relevant to human
5 safety because the design now includes safety ladders, which meet Reclamation standards.
6 (Id. at 7628.)

7 Reclamation articulated a rational conclusion between the facts it found and its
8 conclusion that the elimination of the escape ridges was not a substantial change or
9 significant new circumstances or information. Reclamation found that the ridges had a
10 number of structural problems and the wildlife study of the canal area has shown no sign of
11 deer in the area. Given that the stated purpose of the ridges were to facilitate large mammal
12 escape, the ridges possess structural problems, and deer have not been sighted in the Canal
13 area, Reclamation’s conclusion that eliminating the escape ridge is not a substantial change
14 is reasonable. Additionally, the 1994 FEIS discussed the possibility that the ridges might not
15 prove effective for the All-American Canal.

16 Moreover, Reclamation’s conclusion that the substitution of the escape ladders for the
17 escape ridges is not a substantial change impacting human safety is not arbitrary or
18 capricious. The 1994 FEIS made clear that the ridges “[were] desirable for wildlife” and
19 that ladders might have to be added to the design for human safety. Because testing has
20 shown that the ridges have structural problems, the 1994 FEIS included a discussion of
21 escape ladders for human safety, and the main purpose of the ridges was for wildlife,
22 Reclamation articulated a rational connection between its conclusion that the substitution of
23 the safety ladders for the escape ridges is not a substantial change or significant new
24 information and the facts Reclamation found. Therefore, the Court will grant Defendants’
25 cross-motion for summary judgment as to the design changes and deny Plaintiff’s motion for
26 summary judgment as to the same.

1 **c. Deterioration of Air Quality in the Imperial Valley**

2 Plaintiffs argue the SIR inadequately addresses significant new information regarding
3 the deterioration of air quality in the Imperial Valley, and, in particular, the EPA's
4 classification of the Imperial Valley as a serious nonattainment area for PM-10.¹⁴ As a
5 result, Plaintiffs argue NEPA requires Defendants to prepare a SEIS. Defendants respond
6 Reclamation properly identified and considered the deterioration of air quality in the
7 Imperial Valley and its classification as a PM-10 serious nonattainment area.

8 In 1987, the United States Environmental Protection Agency ("EPA") promulgated
9 national ambient air quality standards ("NAAQS") governing airborne particulate matter
10 pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7617q. Sierra Club v. U.S. E.P.A., 346
11 F.3d 955, 958 (9th Cir. 2003). EPA based the NAAQS on studies that showed the harmful
12 health effects of particulate matter. Id. For example, "when inhaled, PM-10 particles can
13 penetrate deep into the respiratory tract where they can lodge in the lung tissue and lead to a
14 variety of respiratory problems." Id. at 962.

15 Congress amended the Clean Air Act in 1990 to classify areas of the country as
16 attainment or non-attainment for particulate matter and for sub-classification of

17
18 ¹⁴ Plaintiffs argue the 1994 FEIS failed to identify quality standards, baseline Imperial Valley
19 air monitoring data, or PM-10 and diesel fume air data for the lining project. Plaintiffs argue the 2006
20 SIR improperly attempts to remedy these deficiencies in the 1994 FEIS. Plaintiffs also argue that the
21 2006 SIR discusses mitigation measures that appear nowhere in the 1994 FEIS and it does not model
22 or analyze the new measures' effectiveness. Plaintiffs argue this requires a SEIS because a Defendants
23 cannot use a SIR to correct inadequacies in an EIS. Plaintiffs also contend the 1994 FEIS improperly
24 relied on the Imperial County Air Pollution Control District ["ICAPCD"] to analyze mitigation
25 measures through its permit process because ICAPCD does not issue permits and instead requires that
26 analysis of air impacts occur in an EIS. As a result, Plaintiffs contend the original EIS rests on "false
assumptions regarding the cooperation of other agencies . . ." (DCAP & CURE Mot. for Summ. J. at
25 [quoting Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704-05 (9th Cir. 1993)].) However, the
Court has dismissed Plaintiffs' challenge to the 1994 FEIS because Plaintiffs failed to timely challenge
it. Thus, the Plaintiffs are limited to challenging the Defendants' failure to prepare a SEIS on the bases
outlined in 40 C.F.R. § 1502.9(c)(1). Therefore, the Court will not consider these challenges because
they are based on the 1994 FEIS's inadequacies and not on significant new information, circumstances,
or substantial changes.

1 nonattainment areas as serious or moderate. Id. Subsequent to the amendment, the EPA
2 classified the Imperial Valley as a moderate nonattainment area for PM-10. Id. The 1994
3 FEIS identified Imperial County as a nonattainment area for ozone and PM-10. (AR 97.)
4 Regarding the lining project's impacts on air quality and mitigation for those impacts, the
5 1994 FEIS stated:

6 The effect of this alternative on air quality would be temporary, in the form of
7 dust created by excavation of the new canal, operation on unpaved roads,
8 equipment exhaust emissions, and batch plant emissions of dust and engine
9 exhaust.

10 Emissions would be controlled in accordance with regulations of the
11 Imperial County Air Pollution Control District ["ICAPCD"]. Permits required
12 for the various construction activities would be obtained. Dust from
13 construction activities would be localized and would be controlled by
14 sprinkling access roads and work areas with water.

15 (AR 98.) In 2003, the Ninth Circuit ordered the EPA to reclassify the Imperial Valley as a
16 serious nonattainment area for PM-10. Sierra Club, 346 F.3d at 962. The EPA re-classified
17 the Imperial Valley as a serious nonattainment area on August 11, 2004. (AR 7607.)
18 ICAPCD adopted new PM-10 regulations in response to the reclassification. (Id.)

19 The 2006 SIR identified the classification of Imperial Valley as a serious
20 nonattainment area and the new ICAPCD regulations as new information. (AR 7606-10.)
21 Reclamation conducted a conformity analysis and determined the lining project "conforms
22 with the applicable State Implementation Plan and complies with the General Conformity
23 requirements of the Federal Clean Air Act." (AR 7609-10.) The contractor selected to
24 construct the canal must "prepare a Dust Control Plan that incorporates approved and
25 appropriate mitigation methods, and . . . obtain all applicable permits." (AR 7610.) The
26 2006 SIR concluded:

27 The changes in the regulatory environment for air quality do not represent
28 significant new circumstances or information relevant to environmental
29 concerns and bearing on the Project or its impacts because, as described in the
30 AAC Final EIS/EIR, Reclamation and IID had already committed to comply
31 with all current requirements and ensure that the construction contractor has
32 obtained all applicable permits.

1 (AR 7610.)

2 Reclamation's conclusion in the 2006 SIR that the changes in the regulatory
3 environment are not significant new circumstances or regulation is a rational conclusion
4 based on the facts the agency found. The 1994 FEIS acknowledged that the Imperial Valley
5 was a nonattainment area. (AR 97.) The 1994 FEIS apprised the agency and the public that
6 the lining project would require mitigation measures for the project to comply with federal
7 and state air quality standards, even though new regulations may be more stringent. The
8 2006 SIR notes the reclassification but incorporates the 1994 FEIS's prior recognition that
9 the project would require mitigation measures to continue to comply with federal and state
10 air quality standards. The reclassification from moderate to serious nonattainment has not
11 changed Reclamation's duty to mitigate for PM-10, which both the 1994 FEIS and 2006 SIR
12 recognize. Additionally, Reclamation conducted a study that concluded the project
13 conforms with the applicable state and federal regulations. (AR 7610.) Accordingly,
14 Reclamation articulated a rational conclusion that the classification of the Imperial Valley
15 was not a significant new circumstance or information related to environmental concerns.
16 Because Reclamation's conclusion was not arbitrary or capricious, the Court will deny
17 Plaintiffs' motion for summary judgment relating to the PM-10 serious nonattainment
18 classification and will grant Defendants' cross-motion for summary judgment for the same
19 reasons.

20 **C. ESA Violations**

21 Plaintiff CURE argues that the discovery of the Andrade Mesa Wetlands is new
22 information requiring Federal Defendants to re-initiate formal consultation with FWS
23 because the project will result in loss of the wetlands, a critical habitat to the Yuma Clapper
24 Rail. Defendants argue the Court should grant summary judgment in Defendants' favor
25 because Reclamation met its obligation under the ESA. First, Defendants argue the Court
26 should grant summary judgment in favor of Defendants with respect to the Peirson's Milk-

1 vetch because Plaintiffs “failed to provide any argument in the ESA portion of their
2 summary judgment brief [regarding the Peirson’s Milk-vetch]” and FWS’s January 10, 2006
3 biological opinion satisfies any required consultation under the ESA. (Fed. Defs.’ Mot. for
4 Summ. J. at 69.) Regarding the Yuma Clapper Rail, Defendants argue FWS’s January 10,
5 2006 Biological Opinion properly addresses any impacts to the bird because FWS advised
6 Reclamation that section 7 of the ESA does not require federal agencies to initiate
7 consultation with FWS concerning extraterritorial impacts, rather section 8 of the ESA
8 governs how agencies address transboundary impacts on endangered species.

9 In response, Plaintiff CURE argues the ESA requires Defendants to reinitiate formal
10 consultation because Defendants admit that the Andrade Mesa Wetlands and their impact on
11 the Yuma Clapper Rail are significant. Plaintiff CURE also replies that the final critical
12 habitat rule for the Peirson’s milk-vetch has been ruled unlawful and thus Reclamation must
13 reinitiate consultation regarding the Peirson’s milk-vetch because of this “new critical
14 habitat legal fact.”

15 **1. Yuma Clapper Rail & Andrade Mesa Wetlands**

16 As discussed above, “Acts of Congress normally do not have extraterritorial
17 application unless such an intent is clearly manifested.” Sale, 509 U.S. at 188. Nothing in
18 the text of Section 7 of the ESA indicates Congress intended the ESA’s formal consultation
19 requirement to apply extraterritorially. See 16 U.S.C. § 1536. Likewise, nothing in the text
20 of the regulations governing consultation procedures indicates the ESA requires agencies to
21 formally consult with FWS concerning extraterritorial impacts. See 50 C.F.R. §§ 402.10-
22 402.16. Further, as Justice Stevens pointed out in his concurring opinion in Lujan v.
23 Defenders of Wildlife, “the only geographic reference in [section 7(a)] is in the ‘critical
24 habitat’ clause, which mentions ‘affected States.’”¹⁵ 504 U.S. 555, 586-87 (1992) (Stevens,

25
26 ¹⁵ In Lujan, the Court determined the plaintiffs lacked standing to pursue their ESA claims. Although Justice Stevens disagreed and believed the plaintiffs possessed standing, he concurred in the

1 J., concurring). Thus, agencies need not consult FWS regarding extraterritorial critical
 2 habitat and also need not consult FWS regarding extraterritorial endangered species. See id.
 3 at 578-88.¹⁶

4 Additionally, unlike section seven, section eight allows the President to “use foreign
 5 currencies accruing to the United States Government . . . to provide to any foreign country
 6 (with its consent) assistance in the development and management of programs in that
 7 country which the Secretary determines to be necessary or useful for the conservation of any
 8 endangered species or threatened species” 16 U.S.C. § 1537(a). The Act further states
 9 “the Secretary, through the Secretary of State, shall encourage” foreign countries to preserve
 10 threatened or endangered species, agreements with foreign countries to conserve such
 11 species, and foreign persons’ conservation practices. 16 U.S.C. § 1537(b). “Section 9
 12 makes it unlawful to import endangered species into (or export them from) the United States
 13 or to otherwise traffic in endangered species ‘in interstate or foreign commerce.’” Lujan,
 14 504 U.S. at 588 (Stevens, J. concurring) (quoting 16 U.S.C. §§ 1538(a)(1)(A), (E), (F)).
 15 “Congress thus obviously thought about endangered species abroad and devised specific
 16 sections of the ESA to protect them. In this context, the absence of any explicit statement
 17 that the consultation requirement is applicable to agency actions in foreign countries
 18 suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.” Id. at 588.

19 Finally, nothing in the ESA’s purposes suggests Congress intended section seven to
 20 apply extraterritorially. See 16 U.S.C. § 1531(b). Title 16 U.S.C. § 1531(a) sets forth the
 21 congressional findings:

22 The Congress finds and declares that—
 23 (1) various species of fish, wildlife, and plants in the United
 24 States have been rendered extinct as a consequence of economic

25 judgment because he concluded that § 7(a)(2) does not apply to activities in foreign countries. Lujan,
 26 504 U.S. at 585-86 (Stevens, J. concurring).

¹⁶ The Court recognizes this is not controlling but finds Justice Stevens’ reasoning persuasive.

1 growth and development untempered by adequate concern and
conservation;
2 (2) other species of fish, wildlife, and plants have been so
depleted by this numbers that they are in danger of or threatened
3 with extinction;
4 (3) these species of fish, wildlife, and plants are of esthetic,
ecological, educational, historical, recreational, and scientific
5 value to the Nation and its people;
6 (4) the United States has pledged itself as a sovereign state in the
international community to conserve to the extent practicable the
various species of fish or wildlife and plants facing extinction,
pursuant to—
7 (A) migratory bird treaties with Canada and
Mexico;
8 (B) the Migratory and Endangered Bird Treaty
with Japan;
9 (C) the Convention on Nature Protection and
Wildlife Preservation in the Western Hemisphere;
10 (D) the International Convention for the Northwest
Atlantic Fisheries;
11 (E) the International Convention for the High Seas
Fisheries of the North Pacific Ocean; and
12 (G) other international agreements; and
13 (5) encouraging the States and other interested parties, through
Federal financial assistance and a system of incentives, to
14 develop and maintain conservation programs which meet
national and international standards is a key to meeting the
15 Nation’s international commitments and to better safeguarding
for the benefit of all citizens, the Nation’s heritage in fish,
wildlife, and plants.
16

17 The findings demonstrate Congress was concerned about the value and benefit of species
18 and their habitat to the United States and its citizens and the harm their loss would cause
19 within the United States. Although the findings declare the United States’ pledge to honor
20 international agreements and commitments concerning endangered species, nothing in the
21 text suggests the ESA’s requirements apply extraterritorially. Rather, the statute reiterates
22 the United States’ sovereign status and makes clear the United States intends to conserve
23 wildlife, fish, and plants facing extinction pursuant to international agreements “to the extent
24 practicable.” Because nothing in the ESA, its purposes, or findings manifests a contrary
25 intent, the ESA “appl[ies] only within the territorial jurisdiction of the United States.” See
26 Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

1 Nonetheless, because “[q]uestions involving the reach of Congress’ prescriptive
2 jurisdiction are not implicated when the conduct sought to be regulated occurs within the
3 United States,” the Court must look at the conduct the ESA proscribes and the impact of the
4 conduct within the United States to determine whether the ESA requires Reclamation to
5 consider the lining project’s impact on the Yuma Clapper Rail and its habitat, the Andrade
6 Mesa Wetlands. See Gushi Bros. Co., 28 F.3d at 1538. Section 7(a) requires federal
7 agencies to consult FWS regarding agency action that will threaten the existence of listed
8 species or their habitat. 16 U.S.C. § 1536(a). If agency action threatens such species or their
9 habitat, FWS must suggest reasonable or prudent alternatives that an agency could undertake
10 to prevent or mitigate the harm. 16 U.S.C. § 1536(b)(3)(A). The conduct section 7(a)
11 proscribes is the impact to the listed species or its habitat.

12 Plaintiff CURE asserts the lining project will threaten the Yuma Clapper Rail because
13 lining the canal will divert seepage water from the Andrade Mesa Wetlands. The impact to
14 the listed species or its habitat will occur outside of United States territory. Furthermore, for
15 the same reasons Reclamation lacks control over extraterritorial impacts and their
16 rebounding effects in the United States under NEPA, Reclamation and FWS lack control
17 over impacts to the Andrade Mesa Wetlands and the Yuma Clapper Rail under the ESA.
18 The situation here is similar to that in Defenders of Wildlife v. Norton, where the district
19 court held section 7(a) did not require consultation because “[t]he record contain[ed] no
20 suggestion of a way, with or without consultation, for Reclamation to ensure that more water
21 reaches the listed species in the delta. The formulas established by the Law of the River
22 strictly limit Reclamation’s authority to release additional waters to Mexico, and Section
23 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation’s authority.”
24 257 F. Supp. 2d 53, 67-68 (D. D.C. 2003) (citations omitted). As discussed previously, the
25 1944 Water Treaty limits Mexico’s share of Colorado River water. Therefore, even with
26 consultation, Reclamation has no authority to ensure more water reaches the Andrade Mesa

1 Wetlands and the Yuma Clapper Rail. Accordingly, section 7(a) of the ESA, 16 U.S.C.
 2 § 1536(a), does not require Reclamation to consult with FWS regarding the lining project's
 3 impacts on listed species and their habitat located outside of the United States, including the
 4 Yuma Clapper Rail and the Andrade Mesa Wetlands. The Court therefore will grant
 5 Defendant's cross-motion for summary judgment regarding Reclamation's duty to consult
 6 FWS concerning the Andrade MESA Wetlands and the Yuma Clapper Rail and will deny
 7 Plaintiff CURE's motion for summary judgment as to the same.¹⁷

8 **2. Peirson's Milk-vetch**

9 "Judicial review of administrative decisions under the ESA is governed by Section
 10 706 of the [APA]. Under the APA, a court may set aside an agency action if the court
 11 determines that the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not
 12 in accordance with the law.'" Turtle Island Restoration Network v. Nat'l Marine Fisheries
 13 Serv., 340 F.3d 969, 973 (9th Cir. 2003) (quoting Pyramid Lake Paiute Tribe of Indians v.
 14 U.S. Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990)).

15 Section 702 requires agencies to insure that any agency action will not threaten the
 16 existence of any endangered species, threatened species, or such species' habitat. 16 U.S.C.
 17 § 1536(a). The regulations issued under § 702 require the consulting agency to "determine
 18 whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14.

19 Agencies must consult formally with FWS if "such a determination is made." Id. Formal
 20 consultation results in a biological opinion which sets forth FWS's,

21 opinion, and a summary of the information on which the opinion is based,
 22 detailing how the agency action affects the species or its critical habitat. If
 23 jeopardy or adverse modification is found, [FWS] shall suggest those
 24 reasonable and prudent alternatives which [FWS] believes would not violate
 25 subsection (a)(2) and can be taken by the Federal agency or applicant in
 26 implementing the agency action.

26 ¹⁷ Because Plaintiff CURE does not challenge Defendants' ESA § 8 process, the Court will not address it.

1 16 U.S.C. § 1536(b)(3)(A). If FWS determines after consultation that the agency action or
2 reasonable alternatives will not violate 16 U.S.C. § 1536(a)(2) or that “the taking of an
3 endangered species or threatened species will not violate [16 § 1536(a)(2)],” FWS must
4 provide the agency with a written statement in accordance with 16 U.S.C. § 1536(b)(4).¹⁸ 16
5 U.S.C. § 1536(b)(4).

6 The federal regulations promulgated in connection with the ESA consultation
7 requirements provide guidance regarding when re-initiation of formal consultation under the
8 ESA is required:

9 Reinitiation of formal consultation is required and shall be requested by the
10 Federal agency or by the Service, where discretionary Federal involvement or
control over the action has been retained or is authorized by law and:

- 11 (a) If the amount or extent of taking specified in the incidental
take statement is exceeded;
- 12 (b) If new information reveals effects of the action that may
affect listed species or critical habitat in a manner or to an extent
not previously considered;
- 13 (c) If the identified action is subsequently modified in a manner
that causes an effect to the listed species or critical habitat that
was not considered in the biological opinion; or
- 14 (d) If a new species is listed or critical habitat designated that
15 may be affected by the identified action.

16 50 C.F.R. § 402.16.

17 Defendants argue that FWS and Reclamation properly concluded the section 7(a)
18 consultation regarding the Peirson’s milk-vetch because FWS adopted its February 8, 1996
19 conference opinion as a biological opinion on January 10, 2006 and therefore the Court
20

21 ¹⁸ Title 16 U.S.C. § 1536(b)(4) provides in pertinent part:
22 the Secretary shall provide the Federal agency . . . with a written statement that–
23 (I) specifies the impact of such incidental taking on the species,
(ii) specifies those reasonable and prudent measures that the Secretary
24 considers necessary or appropriate to minimize such impact;
25 . . .
(iv) sets forth the terms and conditions (including, but not limited to,
26 reporting requirements) that must be complied with by the Federal
agency . . . to implement the measures specified under clauses (ii) and
(iii).

1 should grant summary judgment regarding the Peirson's milk-vetch. Plaintiff CURE
2 responds that the final critical habitat rule for the Peirson's milk-vetch has been ruled
3 unlawful "in large part" because the rule excluded the area where the new All-American
4 Canal will be built and "this new critical habitat legal fact, along with the unlawful take of
5 the plant species found by the Court in Center for Biological Diversity, . . . , clearly triggers
6 the need for reconsultation pursuant to 50 C.F.R. § 402.16(a)." (Combined Reply & Resp.
7 of Pls. CDEM & CURE to Federal Defs.' Opp'n to Mot. for Summ. J. or Prelim. Inj. &
8 Cross-mot. for Summ. J. at 20.) To support its contention, Plaintiff CURE cites to Center
9 for Biological Diversity v. BLM, No. C03-02509SI (N.D. Cal. Mar. 13, 2006).¹⁹

10 Reclamation has met its burden of showing that no issue of material fact exists as to
11 whether Reclamation met its consultation duties regarding the Peirson's milk-vetch under
12 the ESA. Reclamation and FWS consulted informally regarding the project and its
13 alternatives in 1990. (AR 1613-14.) In response to Reclamation's request for formal
14 consultation, FWS issued a Biological and Conference Opinion for the All-American Canal
15 Lining Project on February 8, 1996. (AR 1612.) Although the Peirson's milk-vetch was not
16 listed at the time of the February 8, 1996 Conference Opinion, the Opinion addressed the
17 Peirson's milk-vetch because it was a candidate species. (AR 1622, 7649.) FWS concluded
18 the project would not jeopardize the continued existence of the Peirson's milk-vetch
19 because:

- 20 1. Reclamation and the proponent have proposed actions to minimize take of
21 the listed and proposed species and the loss of their habitats and to compensate
22 for the loss of habitat that would occur.
2. The proposed project would not result in habitat destruction or
fragmentation that could inhibit recovery.

23 (AR 1627.) On September 9, 2004, Reclamation requested FWS to convert the February 8,
24 1996 Conference Opinion into a biological opinion. (AR 7648.) On January 10, 2006, FWS

25
26 ¹⁹ The Court presumes Plaintiffs are referring to Center for Biological Diversity v. BLM., 422
F. Supp. 2d 1115 (N.D. Cal. 2006).

1 confirmed the February 8, 1996 Conference Opinion as its biological opinion. (AR 7648.)
2 The January 10, 2006 Confirmation of the Biological Opinion concluded the project “is not
3 likely to jeopardize the continued existence of the Peirson’s milk-vetch because the
4 permanent impacts to the milk-vetch habitat have been reduced to 30 acres, and these
5 impacts will be offset by habitat restoration within the existing canal area on a greater than
6 acre-for-acre basis.” (AR 7650.) Because Reclamation formally consulted with FWS and
7 FWS concluded the project will not jeopardize the Peirson’s milk-vetch, no material issue of
8 fact exists that Reclamation met its consultation obligations.

9 Furthermore, CURE has not pointed to a genuine issue of fact that Reclamation failed
10 to consult with FWS, or to a genuine issue of fact triggering Reclamation’s duty to reinitiate
11 consultation. Although CURE argues the court’s decision in Center for Biological Diversity
12 constitutes a new critical habitat legal fact, CURE’s reliance on the case is misplaced. First,
13 the plaintiffs in Center for Biological Diversity named FWS as a Defendant and directly
14 challenged FWS’s exemption of certain Bureau of Land Management (“BLM”) land from
15 designation as critical habitat for the Peirson’s milk-vetch. Center for Biological Diversity,
16 422 F. Supp. 2d 1115. Plaintiff CURE has not named the FWS as a defendant and does not
17 allege in the Amended Complaint that FWS’s critical habitat rule is unlawful or new
18 information requiring reinitiation of consultation and therefore it is not part of the claims
19 Plaintiff CURE alleges. Rather the Amended Complaint alleges the following regarding the
20 Peirson’s milk-vetch:

21 The habitat of the Peirson’s milk-vetch is squarely within the area of and
22 around the proposed construction site for the new canal. The Peirson’s milk-
23 vetch, surviving specimens which still exist within the construction area, is a
24 rare plant species threatened with extinction. The FEIS does not mention, and
25 fails to account for, the listing of the Peirson’s milk-vetch as a threatened
26 plant. The [FWS] has identified habitat degradation and loss as the leading
causes of this species’ decline. On July 28, 2003, a proposed rule for critical
habitat designation for the Peirson’s milk-vetch was published in the Federal
Register, and this rule included proposed designation in the project area of the
proposed canal project. FWS has informed the Secretary and Commissioner
the lining project would “result in the loss of individuals and habitat” of the
Peirson’s milk-vetch. Nonetheless, the Secretary and Commissioner have

1 failed and refused to supplement the FEIS to address this loss of habitat for an
2 endangered species.

3
4 Defendants have not reinitiated ESA Section 7 consultation as required by
5 regulation despite the clear existence of triggers that mandate such re-
6 initiation. Such factors include: the listing under the ESA of a plant species,
7 the Peirson's milk-vetch, that will be taken and damaged by the new canal
8 project

9
10 The plant species, Peirson's milk-vetch, was listed after the completion of the
11 1994 FEIS. The 1994 FEIS, and its appendices admit that this plant species is
12 in the project area, which is under Federal jurisdiction. The proposed project
13 with [sic] harm the habitat of this species.

14 (Am. Compl. ¶¶ 42, 94, 96.) Thus, that the critical habitat rule is new information or
15 unlawful is not part of CURE's claims in the Amended Complaint..

16 Second, the court in Center for Biological Diversity does not consider habitat affected
17 by the All-American Canal. The agency action in Center for Biological Diversity occurred
18 in subunits B and C of the Peirson's milk-vetch habitat considered for critical habitat
19 designation. Center for Biological Diversity, 422 F. Supp. 2d at 1144-45. The All-
20 American Canal project is located in subunit D of the area considered for critical habitat
21 designation. 69 Fed. Reg. 47330, 47332 (Aug. 4, 2004).

22 Third, the court in the Center for Biological Diversity did not find FWS's final
23 critical habitat rule "unlawful." Rather the court determined that FWS's decision to exclude
24 subunits B and C as Peirson's milk-vetch critical habitat was arbitrary and capricious. Id. at
25 1144. The court so held because FWS's determination that listing subunits B and C as
26 critical habitat "would provide virtually no additional Federal Regulatory benefits
27 ignored the recovery benefits of designating critical habitat" and the FWS relied on flawed
28 economic analysis. Id. at 1146, 1149-50, 1153, 1154. On the other hand, FWS did not rely
29 on those "flawed" reasons for excluding subunit D from the listing. See 69 Fed. Reg.
30 47330, 47332, 47341 (Aug. 4, 2004). FWS excluded subunit D from critical habitat listing
31 because of subunit D's "relatively small size and separation from the other critical habitat
32 subunits[,] and the low numbers of Peirson's milk-vetch found within subunit D. Id.

1 Finally, the habitat in subunit D has not been listed as critical habitat. See id. For these
2 reasons, the district court's decision in Center for Biological Diversity does not constitute a
3 new critical habitat legal fact requiring Reclamation to reinitiate consultation with FWS
4 concerning the Peirson's milk-vetch. Therefore, Plaintiff CURE has failed to go beyond the
5 pleadings and point to a genuine issue of material fact triggering Reclamation's duty to
6 reinitiate consultation with FWS. For these reasons, the Court will grant Defendants'
7 motion for summary judgment regarding Plaintiff CURE's Peirson's milk-vetch claims
8 under the ESA.

9 **IV. CONCLUSION**

10 The impact of the All-American Canal Lining Project is significant for all parties to
11 this action. After nearly a year of hard-fought litigation, however, Plaintiffs as a matter of
12 law cannot show entitlement to the injunctive and declaratory relief requested.

13 **IT IS THEREFORE ORDERED AS FOLLOWS:**

14 Federal Defendants' Corrected Opposition to Plaintiff's Motions for Summary
15 Judgment or Preliminary Injunction, and in Support of Federal Defendants' Cross-Motion
16 for Summary Judgment (Doc. #229) is hereby GRANTED and Judgment is hereby entered in
17 favor of Defendants and against Plaintiffs.

18 Plaintiff CDEM's Motion for Summary Judgment, or alternatively for Preliminary
19 Injunction (Doc. #155) is hereby DENIED.

20 Plaintiffs CURE and DCAP's Motion for Summary Judgment, or Alternatively, for
21 Preliminary Injunction (Doc. #152) is hereby DENIED.

22 Defendant Intervenor Imperial Irrigation District's Cross-Motion for Summary
23 Judgment and/or Stay of Action as to the First Amended Complaint (Doc. # 211) is hereby
24 DENIED.

25 United States' Motion to Limit the Scope of Review to the Administrative Record
26 and for Protective Order (Doc. #34) is hereby DENIED in part and GRANTED in part. It is

1 denied as to limiting the scope of review to the Administrative Record and granted as to
2 protecting Federal Defendants from discovery.

3 Plaintiffs' Motion to Supplement the Administrative Record (Doc. #99) is hereby
4 DENIED in part and GRANTED in part. It is denied as to discovery and granted as to
5 allowing Plaintiffs to supplement the Administrative Record.

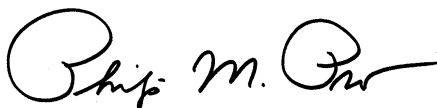
6 Federal Defendants' Motion to Strike Plaintiffs' Declarations and Documents (Doc.
7 #218) is hereby DENIED.

8 Plaintiffs' Motion for Leave to Late File the Declaration of Craig Morgan in Support
9 of Plaintiffs' Motion for Summary Judgment, or Alternatively, for Preliminary Injunction
10 (Doc. #281) is hereby GRANTED.

11 Motion for Leave to File Oversized Brief by Plaintiffs CDEM and CURE (Doc. #156)
12 is hereby GRANTED.

13 Federal Defendants' Amended Motion for Leave to File Overlength Brief (Doc.
14 #227) is hereby GRANTED.

15
16 DATED: July 3, 2006

17
18 

19 PHILIP M. PRO
20 Chief United States District Judge
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